*LIABILITY FOR COPYRIGHT INFRINGEMENT— HANDLING INNOCENCE IN A STRICT-LIABILITY CONTEXT**

Liability for infringement of copyright is said to be absolute —neither knowledge nor negligence need be proven to establish the violation. The ubiquitous use of literary and other creative materials in contemporary society, however, gives rise to many instances where a copyrighted property, or parts of it, is used by persons who do not know of the copyright and who should not be expected to know of it. The law's attempts in this century to deal with the felt inequity of imposing liability *in these cases have resulted in a severe distortion of the rules governing* monetary recovery *for infringement. Rules in conflict with the underlying premises of copyright law have developed in some spheres as a consequence. This Comment, written during the pendency of major congressional reform of the Copyright Act, urges a reconsideration of the law's treatment of innocent infringers and proposes a system of protections which serves the fundamental purposes of copyright protection while safeguarding and encouraging innocent action so as to ensure the widest possible dissemination of ideas and creative works.*

Professor Chafee once lamented that the potential for clarity and logic in copyright law has not been realized; the elements of a coherent philosophy have been "submerged in the statutes and case-law because of the pressure of practical problems of narrow scope which demanded immediate solution."[1] The rules governing liability for infringement of copyright have clearly suffered from this defect. The complicated provisions imposing monetary liability have been said to require heroic efforts at interpretation[2] and were characterized by Judge Feinberg as "an ambiguous hodgepodge of improvisations."[3] This Comment will examine the interplay of considerations which has brought about the present convoluted set of rules of recovery for copyright infringement and will suggest that a simpler and fairer doctrine of liability can be constructed if the values copyright law seeks to protect are made elements of a single coherent system of rules.[4] The problem of the inno-

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1. Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503 (1945).

2. B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 74 n.114 (1966).

3. Davis v. E.I. DuPout de Nemours & Co., 249 F. Supp. 329, 331 (S.D.N.Y. 1966).

4. Such a reevaluation of the law is appropriate at the present time because the first major revision of the Copyright Act [17 U.S.C. §§ 1-215 (1964)] since 1909 is

cent infringer will be the focal point of this study, since innocent violation of copyright highlights the direction and logic of basic copyright doctrine and presents special concerns of its own which should be evaluated.

Not only has the innocent infringer dilemma caused the courts to stretch and bend the rules of monetary liability to avoid harsh results, but it has also raised basic issues about the values which copyright law seeks to protect. In Part I, therefore, the meaning of strict liability for infringement will be examined in light of the goals of the Copyright Act, the various meanings of 'innocence' encountered in this area, and the existence of several fundamental copyright doctrines which generally work to immunize innocent behavior from liability. In Part II, the provisions for monetary recovery will be examined; these rules are the cutting edge of present copyright law, and the attempt to mitigate the severity of liability for innocent infringement has caused many of the problems apparent in them. In Part III, the progress of the law in coping with the innocent infringer and prospects for future developments in this sphere will be explored.

I

CENTRAL GOALS AND THEMES OF COPYRIGHT PROTECTION

With surprising frequency courts discussing liability for infringement of copyright have indicated that in their view the goals to be considered in shaping doctrine in this area are compensation of the copyright proprietor for violation of his exclusive rights,[5] deterrence of future infringement of those rights,[6] and prevention of unjust enrichment of the infringing party.[7] Analysis of the context in which copyright law developed and consideration of the statements of more reflective judicial opinions, however, make it clear that, in the main, copyright serves a different, broader end.

The present copyright law was enacted pursuant to the constitutional grant of congressional power "[t]o promote the Progress of Sci-

presently before Congress. Analysis of the recommenations of many reports and studies prepared to assist Congress in passing this revision is also possible. Though certain provisions of the proposed Code (commentators use this term interchangeably with "Act") are still in great dispute, for example, those covering cable television systems, the damages provision in the current bill, S. 543, 91st Cong., 1st Sess. (1969), and the recommendations of those concerned with the provisions governing liability in general have settled in a definable pattern. Therefore, the approach taken by the proposed revision may profitably be evaluated in light of the problems presently found in copyright law.

5. *E.g.*, Brady v. Daly, 175 U.S. 148 (1899).

6. *E.g.*, F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952).

7. See text accompanying note 235 *infra* and cases cited in notes 193-94 *infra*.

ence and the useful Arts, by securing for limited Times to Authors . . . the excusive Right to their . . . Writings . . . ."[8] The fundamental purpose of copyright protection, therefore, is to promote societal development—and thus the improvement of all persons—by encouraging the production and dissemination of creative works.[9] While it may well be that creative activity itself is predominantly a spontaneous or self-generated process,[10] copyright law does have a direct influence:

> Copyright tends . . . to serve the material expectations and psychological cravings of the individual creative worker: it gives him an opportunity (though by no means the certainty) of reward for his efforts; conventional recognition for the feat of creating a work; a means (though not a very good one) of preserving the artistic integrity of the work through controlling its exploitation.[11]

Although the encouragement of creative activity may be necessary in order to achieve societal development, the purpose of the law is to further social development and not creative activity per se.[12] As the Supreme Court stated in *Mazer v. Stein*,[13]

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts."[14]

This goal is an important factor in determining what should be the exact dimensions of the rights conferred under copyright law. The policies motivating copyright, therefore, are somewhat in conflict: one favors the creation of works of authorship, and the other demands that the public have the fullest possible access to the fruits of creative labors.[15]

The fact that the major reason for copyright law is society-wide betterment[16] has potential implications for the extent of protection given

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8. U.S. CONST., art. I, § 8.
9. B. KAPLAN, *supra* note 2, at 74 & 75.
10. *Id.* at 75.
11. *Id.* *See* M. NIMMER, NIMMER ON COPYRIGHT § 3 (1970).
12. B. KAPLAN, *supra* note 2, at 75 & 76.
13. 347 U.S. 201 (1954).
14. *Id.* at 219; Columbia Broadcasting System, Inc. v. DeCosta, 377 F.2d 315, 319 (1st Cir. 1967).
15. B. KAPLAN, *supra* note 2, at 75. *Cf.* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir. 1966) (Lumbard, C.J., concurring):

> The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.

16. H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909); *see* Berlin v. E.C.

an individual author. The right granted the creator cannot accurately be described as an ordinary one of property or personalty.[17] It is, instead, a statutory monopoly on the use of the creative work,[18] and as such it should be subject to special scrutiny.[19] Since the monopoly is only permitted because of the general goal of aiding societal development, specific rules of liability for violation of the right should be drawn with that goal in mind;[20] the determination of liability should be based on rules of general applicability which reflect the need to protect authors only to the extent necessary to encourage continued production of works of merit. To extend protection beyond this point would be to lose sight of the very purpose of the copyright law. In addition, the fact that copyright is a monopoly right granted in trust for all of society should be an independent consideration in shaping liability doctrine. It should be taken into account when other factors considered in determining a particular issue of protection are in equipoise. And where no clear policy sustains enforcement of liability for a particular class of infringement, the exclusive nature of the right asserted seems a fully appropriate factor to consider in making a decision. Professor Chafee summed up the issue simply: "Protection should not go substantially beyond the purposes of protection."[21]

The courts and the Congress have faced difficult questions in their efforts to achieve the goals of the Act. Many of these issues become evident upon analysis of the nature of strict liability for violation of the exclusive rights and upon reflection on the many basic themes

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Publications, Inc., 329 F.2d 541, 544 (2d Cir. 1964): "[C]ourts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry."

17. To say that copyright is "property," although a fundamentally unhistorical statement, would not be baldly misdescriptive if one were prepared to acknowledge that there is property *and* property, with few if any legal consequences extending uniformly to all species and that in practice the lively questions are likely to be whether certain rights ought to attach to a given piece of so-called property in given circumstances.

B. KAPLAN, *supra* note 2, at 74.

18. *See* De Acosta v. Brown, 146 F.2d 408, 412-14 (2d Cir. 1944) (Hand, J., dissenting).

19. We should start by reminding ourselves that copyright is a monopoly. Like other monopolies, it is open to many objections; it burdens both competitors and the public. Unlike most other monopolies, the law permits and even encourages it because of its peculiar great advantages. Still, remembering that it is a monopoly, we must be sure that the burdens do not outweigh the benefits.

Chafee, *supra* note 1, at 506. *Cf.* W. NAVIN, PATENTS 2 (rev. ed. 1966): "Artificial monopolies are generally repugnant to the common law because they tend to enrich the monopolist to the detriment of society. The detriment arises out of the withholding of supplies of goods or services from the market . . . ."

20. B. KAPLAN, *supra* note 2, at 76.

21. Chafee, *supra* note 1, at 506.

of copyright law that bear on the issue of what constitutes an infringement. The dilemma of innocent infringement is a special problem, but it underscores the need to consider the basic goals of this area of the law in order to establish a coherent set of liability rules.

A. Absolute Liability In Perspective

The rule is well established in copyright law that lack of intention to infringe is not a defense to an action for infringement.[22] The Supreme Court recognized the rule in *Buck v. Jewell-LaSalle Realty Co.*,[23] where Justice Brandeis said: "Intention to infringe is not essential under the Act."[24] Similarly, the absence of negligence does not excuse infringement. It has been held that direct copying of copyrighted matter is fully actionable even if the infringement is committed in the thoroughly reasonable belief that the material is in the public domain.[25] Neither lack of intent nor negligence is a defense in situations of indirect copying,[26] innocent printing[27] and selling,[28] or infringeing acts of employees.[29]

Thus, regardless of whether the infringement is committed unconsciously,[30] in the good faith belief that the copying done is permissible,[31] or due to the wrongful copying of a third party which could not be discovered even through the use of reasonable care,[32] the in-

22. *See* M. NIMMER, *supra* note 11, § 148, and cases cited therein.
23. 283 U.S. 191 (1931).
24. *Id.* at 198.
25. *See generally* Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950).
26. *See* De Acosta v. Brown, 146 F.2d 408 (2d Cir. 1944).
27. *See generally* American Code Co. v. Bensinger, 282 F. 829, 834 (2d Cir. 1922).
28. *See* Miller v. Goody, 139 F. Supp. 176 (S.D.N.Y. 1956), *rev'd sub nom.* Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260 (2d Cir. 1957); F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952).
29. *See* Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929). In the *Dreamland* case there was vicarious liability for the infringements committed by hired musicians. The absence of normal common law master-servant relations did not deter the court on appeal, which noted that it upheld liability "even though the orchestra be employed under a contract that would ordinarily make it an independent contractor." *Id.* at 355.
30. *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936); Harold Lloyd Corp. v. Witner, 65 F.2d 1 (9th Cir. 1933); Whitney v. Ross Jungnickel Inc., 179 F. Supp. 751 (S.D.N.Y. 1960). *See also* Northern Music Corp. v. Pacemaker Music Co., 248 F. Supp. 278 (S.D.N.Y. 1965).
31. Pickwick Music Corp. v. Record Prods., Inc., 292 F. Supp. 39 (S.D.N.Y. 1968); Davis v. E.I. Du Pont de Nemours & Co., 240 F. Supp. 612 (S.D.N.Y. 1965); *see* County of Ventura v. Blackburn, 362 F.2d 515 (9th Cir. 1966); Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963).
32. Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 198 (1931); *see* F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952).

fringer is fully liable under present law for the plaintiff's damages,[33] his own profits,[34] or statutorily prescribed damages.[35]

Many efforts have been made over the last 60 years to alter or abolish the strict liability principle to the extent that it gives rise to monetary recovery.[36] It has been suggested, for example, that innocent infringers should be subject only to injunctions against further infringement.[37] But these proposals have met with little legislative success. Instead, the felt unfairness of the absolute liability imposed by the Act has been mitigated only indirectly through the courts' studied manipulation of the monetary remedies afforded against the infringer.[38]

The concept of absolute liability for infringement appears to have stemmed from the early view that no property was more emphatically a man's own than his literary works,[39] and that therefore they must be afforded legal protection to the same extent as his real or personal property.[40] The modern view of literary property, and especially the concern over the monopoly rights afforded by copyright laws,[41] indicates that strict responsibility must now be defended on a different basis. The general philosophy behind such liability today is clearly stated by Professor H. L. A. Hart:

> [T]he law, in the name of the general welfare of society, may enforce compensation from one who has injured another, even where morally, as a matter of justice, it might not be thought due. This is often said to be the case when liability in tort is strict, i.e. independent of the intention to injure or failure to take care. This form of liability is sometimes defended on the ground that it is in the interest of "society" that those accidentally injured should be compensated; and it is claimed that the easiest way of doing this is to place the burden on those whose activities, however carefully controlled, result in such [injuries]. They commonly have deep pockets and opportunities to insure.[42]

Courts did not easily come to the conclusion that these policies

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33. See text accompanying notes 164-96 *infra.*

34. See text accompanying notes 197-227 *infra.*

35. See text accompanying notes 247-98 *infra.*

36. These revision attempts are surveyed in A. LATMAN & W. TAGER, LIABILITY OF INNOCENT INFRINGERS OF COPYRIGHTS, STUDY NO. 25, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON COPYRIGHT LAW REVISION 139, 149-52 (Comm. Print 1960).

37. *See id.*

38. See text accompanying notes 148-63 *infra.*

39. *See* Millar v. Taylor, 98 Eng. Rep. 201, 224 (K.B. 1769).

40. *See* Jeffreys v. Boorey, 10 Eng. Rep. 681 (H.L. 1854).

41. See text accompanying notes 17-21 *supra.*

42. H. HART, THE CONCEPT OF LAW 162 (1964). *See also id.* at 169; compare discussion of the analogy of strict liability for innocent conversion, note 61 *infra,* and accompanying text.

should govern liability in copyright cases. As late as 1939 the Second Circuit noted in *Barry v. Hughes*[43] that "one is ordinarily liable for only those consequences of one's acts which a reasonable person would anticipate,"[44] and stated that liability imposed on a defendant without regard to "however innocent he may be . . . would be a harsh result, and contrary to the general doctrine of torts."[45] Finding a narrower dispositive issue,[46] the court put off deciding the issue of innocent liability. Before leaving the subject, however, Judge Hand expressed the following view of the matter:

> Laying aside a possible action for unjust enrichment, or for injunction after discovery, we should hesitate a long while before holding that the use of material, apparently in the public demesne, subjected the user to [liability for] damages, unless something put him actually on notice.[47]

The court's hesitation lasted five years. The problem arose again for decision in *De Acosta v. Brown*,[48] which involved the alleged plagiarism of a screenplay on the life of Clara Barton by a purportedly non-fiction biography written a year later. The court unanimously found impermissible copying but split over liability of the defendant publishing house which was an innocent secondary infringer.[49] The

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43. 103 F.2d 427 (2d Cir. 1939).

44. *Id.*

45. *Id.*

46. *Id.* at 428 (defendant had not copied plaintiffs' material).

47. *Id.* at 427.

48. 146 F.2d 408 (2d Cir. 1944).

49. *Id.* at 412-13 (Hand, J., dissenting). Judge Hand argued that imposition of liability on innocent secondary users of copyrighted matter would be "an appreciable incubus upon the freedom of the press." *Id.* at 413. The cognate problem of strict liability for defamation has raised a similar objection. Strict liability for disseminators of information is dangerous in that it may "lead the owners of our modern channels of communication to restrict their use in public debate . . . [which is] too high a price to pay for the additional protection given to private reputations by strict liability here." James, *The Bases of Strict Liability*, 17 LA. L. REV. 293, 298-99 (1958). However, liability in defamation cases is no longer without regard to innocence:

> The fairly well-accepted rule as to such "disseminators" is that they will not be liable for defamatory statements contained in materials sold or circulated by them unless they have been guilty of some fault, approximating negligence, in failing to discover the defamatory statement before disseminating it. It is said there is no liability "if he (the disseminator) can prove upon the trial to the satisfaction of the jury that he did not know the paper contained a libel; that his ignorance was not due to any negligence on his part; and that he did not know, and had no ground for supposing, that the paper was likely to contain libelous matter."

Leflar, *Radio & TV Defamation: "Fault" or Strict Liability?*, 15 OHIO ST. L.J. 252, 257-58 (1954) (quoting in part from Street v. Johnson, 80 Wis. 455, 458, 50 N.W. 395, 396 (1891) (Burden of proof on defendant)). *Cf.* New York Times v. Sullivan, 376 U.S. 254 (1964). Professor Leflar has noted:

> Substantially the same rule applies to telegraph companies transmitting apparently innocent messages, with the additional protective possibility of sharing

majority found "the authorities . . . too conclusive to allow of doubt"[50] that innocence is no defense. They stressed three points. First, whereas the Act "makes significant distinctions in certain instances based on innocent or willful infringement, as the case may be, it does not do so in the general provision for award of profits and actual damages, or those statutory sums allowable in the court's discretion in lieu of actual damages."[51] Second, in light of the cases stressing constructive notice of protection by registration of the copyright, an infringer publishes at his own peril.[52] Third, infringement liability is similar to that for conversion[53] and should therefore be absolute.[54]

Although he accepted the court's Aristotelian view[55] that the innocent infringer should disgorge his profits, Judge Hand was forced to dissent on the issue of liability for damages:

> The chances are slight that these will be substantial, and I should have been silent, were it not that we are, in my opinion, committing ourselves to a doctrine which is wrong in theory, which the cases do not require us to adopt, and which imposes a risk upon publishers that is likely to prove an appreciable and very undesirable burden upon the freedom of the press.[56]

Hand's argument begins with a distinction between direct and indirect infringers,[57] an analysis disputed by the majority.[58] He differentiates between one who copies an original and one "who copies a copy, supposing it to be an original."[59] In his view an indirect—or secondary—

> the sender's privileges, if any, as to non-innocent appearing messages. News vendors and keepers of lending libraries cannot read all their magazines, newspapers and books before they sell or rent them, to see if there is libelous matter in them. Transmitters of messages have to take them as they come, except for obviously defamatory ones. Is there any sensible distinction between these unintentional publishers of libels, and radio or television broadcasters who publish unanticipated interpolations of practically uncensorable programs over their stations?

Leflar, *supra* at 257-58.

50. 146 F.2d at 410.

51. *Id.*

52. *See generally id.* at 411.

53. *Id.* at 412.

54. *Id. See* RESTATEMENT (SECOND) OF TORTS, §§ 222 & 244 (1965).

55. *See* B. KAPLAN, *supra* note 2, at 72.

56. 146 F.2d at 412.

57. *Id.* at 413. *See generally* B. KAPLAN, *supra* note 2, at 73.

58. 146 F.2d at 411.

59. *Id.* at 413. *See* McCulloch v. Zapun Ceramics, Inc., 97 U.S.P.Q. 12 (S.D. N.Y. 1953). It has been suggested that the classification of an infringement as direct or indirect is governed by prevailing social ideas of justice or policy rather than logic. Note, 45 COLUM. L. REV. 644, 648 n.23 (1945). It seems clear that, at the minimum, Judge Hand failed to provide "a satisfying basis for distinguishing other cases of innocence" from that which he wished to protect in the *De Acosta* case. B. KAPLAN, *supra* note 2, at 73.

The Lanham Trademark Act, 15 U.S.C. §§ 1051-1127 (1964), in effect adopts the

infringer should only be liable to an injunction and compelled to return profits made on the infringement.

Hand argues, relative to the first and third points of the majority, that the exculpatory provisions in section 21 of the Act show that Congress' intention was to protect innocent behavior[60] and that the analogy to conversion is apposite but misused by the majority because of the knowledge requirement:

> I accept the analogy of conversion; it is true that if, for instance, I carry off as mine another's watch in my bag, it is no excuse that I think it mine. However, I do not convert it, whatever acts of dominion I exercise over my bag, if I do not know, or am not chargeable with notice, that there is a watch in the bag, though I may have equally denied the owner's right.[61]

Hand made no mention of the constructive notice argument, which rests in part on his own language in the 1910 case of *Stern v. Jerome H. Remick & Co.*[62] There the court held that since knowledge of the copyright is available in the Copyright Office, failure to inquire before publishing leads to liability for infringement. The constructive notice argument falters, however, in light of the rule of *Washingtonian Publishing Co. v. Pearson*[63] that an author may defer registration of copyright until the time when he wishes to bring suit. Delay in registration does not affect the right to recover for infringement in most cases.[64]

The rule of strict liability was firmly implanted by the *De Acosta*

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direct-indirect infringer distinction. Without defining the exact meaning of "innocent infringers," the Act limits the remedies available against them to injunctions. *Id.* § 1114(2).

60. 146 F.2d at 414; see text accompanying notes 134, 314-17 *infra.*

61. 146 F.2d at 413. The argument would be that since the innocent infringer by definition knows only that he has a given piece of creative work, and *not* that he has copyrighted matter, it cannot be said that he has knowledge or intent like that required for the tort of conversion. Hand cites what is now the RESTATEMENT (SECOND) OF TORTS, § 222, comment *b* ("Necessity of Intention,") and comment *c* ("Character of Intent Necessary") (1965).

Some courts have noted that, contrary to the situation in conversion, title remains with the copyright holder whose right is violated. Pickford Corp. v. DeLuxe Laboratories, Inc., 169 F. Supp. 118 (S.D. Cal. 1958).

62. 175 F. 282 (S.D.N.Y. 1910).

63. 306 U.S. 30 (1939).

64. This is illustrated by the circumstances before the court in Ziegelheim v. Flohr, 119 F. Supp. 324 (E.D.N.Y. 1954). There the publisher had not registered his copyright when he published his book and had refrained from applying for the copyright registration certificate for more than nine years after the alleged infringement had taken place. The court held the action not barred by laches and found no abandonment in the long period of inaction; plaintiff recovered his damages and the infringer's profits in spite of nearly a decade of delay. Thus, at least under the Supreme Court's present interpretation of the registration requirement in the *Washingtonian* case, the argument that an infringer has constructive notice should carry little weight.

case and its progenitors despite the suggested weakness of the court's actual arguments for the principle.[65] Moreover, the rule has not been shaken by a variety of objections to strict liability which have been raised in the broader context of tort law.[66]

B. Dimensions of the Innocent Infringer Dilemma

It is evident that copyright law covers behavior which could be labelled 'innocent' in a wide variety of senses.[67] The most interesting and problematical meaning of the term, in the context of a strict liability system, is that referring to the absence of both intention and negligence as to the infringement. The sort of innocent infringement which is dealt with here, therefore, will be that of the actor who violates the rights of the copyright holder without intending to do so and without having any reason to suspect that he is doing so.

It is clear that there are numerous circumstances in which this sort of innocence is involved in violation of copyrights.[68] There appear to be four basic patterns of this type of innocent infringement: First, use of material on which notice of copyright has been omitted;[69] second, deliberate copying in the belief that the material taken is in the public domain or that the copying does not constitute an infringing use;[70]

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65. See cases cited in M. NIMMER, *supra* note 11, § 148.

66. One of the main issues is deterrence. It is argued by some writers that "[a] defendant who is held liable without regard to fault will certainly take care to avoid fault and may also take 'super care' to avoid harming others." Franklin, *Replacing The Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 781 (1967). But it is generally admitted that the difference in deterrent impact between "liability for all conduct" and "liability for unreasonable conduct" is likely to be minimal. *See id.* at 781 n.24. *Cf.* Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 743 (1965). On the more general objections to strict liability, see Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446, 448-49 (1964). It has been argued that equitable distribution of the costs of strict liability is frequently a problem even in the modern business context. *See generally* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 522 (1961). General objections have been raised against the adverse impact of strict liability on the entire free enterprise economy. *See* Lucey, *Liability Without Fault and the Natural Law*, 24 TENN. L. REV. 952, 962 (1957) (stifles economic progress by increasing business costs and decreasing most profits); Note, 13 STAN. L. REV. 645, 649 (1961) (discourages development of new products with unknown risks); Note, 26 N.Y.U.L. REV. 352, 358, 361 (1951) (favors established large business concerns over small marginal producers). These objections were framed in the manufacturing context, and are thus directly related to commercial production of copyrighted matter, an enterprise fraught with similar risks.

67. See text accompanying notes 103-47 *infra*.

68. See text accompanying notes 23-32 *supra*.

69. See text accompanying notes 125-35 *infra*.

70. Davis v. E.I. Du Pont de Nemours & Co., 240 F. Supp. 612 (S.D.N.Y. 1965). *See* Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963); Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950); Pickwick Music Corp. v. Record Prods., Inc., 292 F. Supp. 39 (S.D.N.Y. 1968).

third, unconscious plagiarism in which the source of the matter used has been forgotten;[71] and finally, good faith use of infringing matter received from others in circumstances warranting the reasonable assumption that it is original material.[72] In all of these situations present law imposes liability.[73]

The conflict which underlies each of the various cases in which innocence is involved is that "between the full enjoyment of rights by the copyright holder on the one hand, and the interests of users who, even though scrupulously attempting to respect such rights, commit infringement."[74] In explaining why the balance of these rights tips against the innocent infringer, the courts and commentators cite four different factors; a fifth is here suggested as an underlying consideration.

First, it is said that innocence "should no more constitute a defense in an infringement action, whether statutory or common law, than in the case of conversion of tangible personalty."[75] In the *De Acosta*[76] case itself, the majority relied on this analogy, but Judge Hand, in dissent, persuasively argued that under normal conversion principles an infringer would not be liable unless he had knowledge that what he took contained copyrighted matter.[77] In addition, there remains the underlying fear expressed by Professor Kaplan that in using the conversion analysis we are overlooking the danger involved in "assimilating too easily the case of a man unknowingly taking a gold watch with that of a bookseller selling a book which, unbeknown to him, contains a plagiarism."[78] It is not at all clear that copyrights should be viewed as property in the sense in which conversion would be an applicable concept.[79]

Second, it is sometimes suggested that innocence is easy for the defendant to allege and difficult for the plaintiff to disprove.[80] Beyond the obvious point that, for example, the criminal law appears to function satisfactorily on the basis of presumed innocence, the fact remains that in a civil suit for copyright infringement the plaintiff needs proof by

71. *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936); Harold Lloyd Corp. v. Witwer, 65 F.2d 1 (9th Cir. 1933); Whitney v. Ross Jungnickel, Inc., 179 F. Supp. 751 (S.D.N.Y. 1960).

72. Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950).

73. See text accompanying notes 22-35 *supra.*

74. A. LATMAN & W. TAGER, *supra* note 36, at 155.

75. M. NIMMER, *supra* note 11, § 148.

76. De Acosta v. Brown, 146 F.2d 408 (2d Cir. 1944); see text accompanying notes 48-65, *supra.*

77. See text accompanying note 61 *supra.*

78. B. KAPLAN, *supra* note 2, at 73.

79. See text accompanying notes 17 & 18 *supra.*

80. M. NIMMER, *supra* note 11, § 148.

only a preponderance of the evidence, and not beyond a reasonable doubt, to establish his case. This stress on the difficulty of proof can be attacked as an attempt to avoid the burden of proof naturally falling on the plaintiff.[81] More fundamentally, however, this objection to protecting innocent infringers, even if valid, may be entirely avoided by placing the burden in this regard on the defendant himself. The proposed revision of the Act, for example, reduces liability for statutory damages "[i]n a case where the infringer sustains the burden of proving, and the court finds, that he was not aware and had no reason to believe that his acts constituted an infringement of copyright."[82] A similar rule on liability for damages and profits would avoid any unfair difficulty the copyright proprietor might encounter in proving facts in relation to which the defendant has special knowledge or access to information.

Third, it is argued[83] that, especially in the case of secondary infringements, a rule of exculpation for innocence would encourage the establishment of fictitious primary users of the material in order to gain insulation for the main, but now secondary, use. While upholding the liability of an allegedly innocent infringer, the court in *Shapiro, Bernstein & Co. v. H. L. Green Co.*[84] said:

> Were we to hold otherwise, we might foresee the prospect—not wholly unreal—of large chain and department stores establishing "dummy" concessions and shielding their own eyes from the possibility of copyright infringement, thus creating a buffer against liability while reaping the proceeds of infringement.

The prospect which troubled the court would appear to constitute only a minor threat, since the courts have means of exposing the fiction. If the dummy infringer is really an arm of the secondary user, the secondary infringer may be liable under the doctrine of vicarious liability for the acts of employees.[85] If the primary user of copyrighted matter is separate from, but set up by, the secondary infringer, placing the burden of proving innocence on the infringer will assure that the scheme does not serve to insulate the secondary user.[86] Further safeguards are built into the meaning of innocence. An infringer must

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81. *See generally* Comment, *Joint and Several Liability for Copyright Infringement: A New Look at Section 101(b) of the Copyright Act,* 32 U. CHI. L. REV. 98, 118 (1964).

82. S. 543, 91st Cong., 1st Sess., § 504(c)(2) (1969).

83. Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 309 (2d Cir. 1963); Note, 93 U. PA. L. REV. 459, 460 (1945).

84. 316 F.2d 304, 309 (2d Cir. 1963).

85. *See* Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929).

86. See text accompanying note 82 *supra.*

show that he had no reason to believe that he was violating copyright protection in order to establish his innocence. If he merely shields his eyes from the possibility of infringement, as the court in *Green* feared, he obviously would not meet this test. The reasonably prudent secondary user of matter which may be copyrighted would take ordinary steps to be sure the material handled does not infringe,[87] and studied ignorance of the practices of an associated firm would hardly meet this test. Even in the publishing or broadcasting fields, where it might be impossible to check each piece of material for possible infringement, complete absence of any attention to general practices of suppliers would be unreasonable.

Fourth, the argument is advanced on several levels that of the two innocent parties, infringer and damaged proprietor, the infringer is usually in a better position to protect against the chance of infringement.[88] Some courts have suggested that secondary infringers can police the practices of primary ones[89] or use indemnity clauses,[90] and that all infringers are in a position to insure against infringement liability.[91]

There are two ways in which the infringer could be compared to the copyright holder in this context. The first comparison is on the basis of practical potential for preventing infringement. It can be assumed in this analysis that the proprietor has completed the normal protective activities[92] which assure copyright protection and which notify all potential infringers. On this basis it is clear that in general the infringers have more control over their infringing acts than the proprietor, who may not even know of the existence of the infringer. But greater control over action, by itself, is not a significant factor in the situations at issue here, since control will not be exercised by innocent infringers, who by definition have no basis on which to suspect—and hence to prevent—the violation of exclusive rights. On the contrary, in given cases specific copyright holders might suspect the existence or planned existence of certain infringing activities, which would put them in a position to prevent or stop those activities. Thus, in many circumstances there is no clear sense in which innocent infringers are in a better position than copyright proprietors; therefore they should not be held liable on that basis.

Another aspect of the argument to show that infringers are better

87. *Cf.* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 153-79 (3d ed. 1964).

88. See text accompanying note 74 *supra.*

89. Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 309 (2d Cir. 1963).

90. *Id.* at 308 & 309.

91. *Id.*

92. *See* 17 U.S.C. §§ 10-19 (1964).

able to protect against infringement is that they are better able to withstand the financial impact of liability. Part of this alleged financial ability is preventive: the potential infringer can insure against liability. Many infringers obtain "save-harmless" agreements[93] from the suppliers to assure that they will be indemnified for any liability for innocent use they make of matter supplied to them which actually infringes copyrighted material. In many of these cases, however, the only party with substantial assets is the innocent broadcaster, publisher or other secondary user of copyrighted material.[94] This fact highlights the second aspect of this argument, namely the judgement that infringers "commonly have deep pockets."[95] Innocent infringers are often "the only financially responsible parties [in] the plaintiff's reach."[96]

This line of argument, however, merely assumes the propriety of placing the liability on the innocent infringer. The copyright owner could secure insurance or indemnity agreements to protect against diminution of the value of his copyright, just as he does fire insurance to protect his investment in a home.[97] Similarly, the copyright proprietor today is often the publishing house or record company and may, therefore, have deeper pockets than an infringer.[98] The real thrust of the deep-pockets aspect of the fourth argument, however, is that imposition of liability on innocent infringers is at least a workable rule, since they can insure and they may have sizable financial resources. Therefore, this argument does not provide a justification for imposing liability on innocent infringers; it merely claims that there is no practical difficulty in doing so.

Therefore, none of the four most common justifications offered by the courts in support of liability for innocent infringement offers a clearcut reason why the innocent infringer should bear the loss. There remains, however, a fifth and more basic appeal on which imposition of responsibility may be grounded. Since the copyright proprietor is himself an innocent party, purely as a matter of justice it seems that he should not be made to bear the damage caused by another party. This is especially persuasive in view of the law's commit-

93. Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 309 (2d Cir. 1963). *See* R. BROWN, THE OPERATION OF THE DAMAGES PROVISIONS OF THE COPYRIGHT LAW: AN EXPLORATORY STUDY, STUDY NO. 23, SENATE COMM. ON THE JUDICIARY, 86TH CONG. 2D SESS., REPORT ON COPYRIGHT LAW REVISION 86-88 (Comm. Print. 1960).

94. *See, e.g.*, Miller v. Goody, 139 F. Supp. 176, 182 (S.D.N.Y. 1956), *rev'd sub nom.* Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260 (2d Cir. 1957).

95. *Cf.* H. HART, *supra* note 42, at 162.

96. A. LATMAN & W. TAGER, *supra* note 36, at 156.

97. Infringement liability insurance is also available. Leflar, *Radio and TV Defamation: "Fault" Or Strict Liability?*, 15 OHIO ST. L.J. 252, 266-67 n.57.

98. *See generally* B. KAPLAN, *supra* note 2, at 75.

ment, in the form of the Copyright Act, to the protection and encouragement of authors. This justification for imposing liability is a simple enterprise liability argument:[99] since the infringer introduces the risk into the community, he should be made to bear the loss when accidental harm to others occurs as a result of his activities. But this argument does not provide a logical basis for establishing thoroughgoing strict responsibility. It militates for protection in cases where there is equality of innocence and an absolute need for compensation. It does not, however, require imposition of liability where no harm is shown,[100] for example, nor does it justify the minimum recovery provisions of the Act, because by definition the amount of such awards is not calculated to compensate the author to an extent proportional to the injury done.[101] Thus, the argument from justice must be reevaluated in each context to determine whether any given principle of liability is necessary.

In general, absolute liability has been imposed in cases of innocent infringement despite the unpersuasiveness of the four most common reasons cited for the rule and the limited scope of the fifth justification. The courts have struggled[102] to apply the rule without undue harshness to innocent violators of protected rights. Innocent behavior, however, is directly protected by certain provisions of the law—illustrating that innocence, even on the part of an infringer, is a value which the law seeks to protect.

C. *Protective Doctrines of Copyright Law*

It is apparent that at present the most significant practices bearing directly on the problem of absolute liability for innocent infringement lie in the area of the Act's monetary recovery provisions themselves.[103] Nonetheless, several important doctrines—at the heart of the general scope and protections of copyright law—tend to afford insulation from liability to innocent action in a wide variety of ways. Some of these rules protect innocent and *male fide* behavior alike, but many provide immunity specially designed to exempt innocent action. These general doctrines of copyright law must be examined to establish a clear perspective on how innocent behavior is currently treated under the Act in an effort to counter the effect of history and to achieve the goals of the law.[104]

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99. *See* A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 55-57 (1951).
100. See text accompanying notes 322-27 *infra.*
101. See text accompanying notes 265-97 *infra.*
102. See text accompanying notes 150-297 *infra.*
103. See text accompanying notes 153-297 *infra.*
104. See text accompanying notes 5-21 *supra.*

First, only violations of specifically listed exclusive rights are actionable;[105] not every use of a copyrighted work will constitute an infringement.[106] Thus, such acts as reading or viewing copyrighted matter, privately performing a dramatic piece,[107] or even publicly performing a musical work for no profit are not infringements of the copyright holder's exclusive rights. The absence of a profit motive in circumstances such as these does not assure that the actors are innocent in the sense of having no knowledge of the copyright, but they are innocent of the intent to wrongfully exploit another's property for personal gain. The rationale for permitting these actions is not that they are harmless,[108] since a free or private performance of a work may well reduce the market for commercial performance of the work and thereby harm the copyright proprietor. The apparent purpose of the rule, then, is to encourage the use and dissemination of culturally elevating works while protecting persons whose infringement of copyrighted matter is not *male fide.*

Second, action for copyright infringement may not be maintained in the absence of a showing of copying.[109] This rule insulates a partic-

105. *See* Jewelers' Circular Publishing Co. v. Keystone Publishing Co., 274 F. 932 (S.D.N.Y. 1921), *aff'd,* 281 F. 83 (2d Cir. 1922). *See generally* Morris County Traction Co. v. Hence, 281 F. 820 (3d Cir. 1922).

106. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Blazon, Inc. v. DeLuxe Game Corp., 268 F. Supp. 416 (S.D.N.Y. 1965); *see* Time, Inc. v. Bernard Geis Assoc., 293 F. Supp. 130 (S.D.N.Y. 1968).

107. M. NIMMER, *supra* note 11, § 100.

108. They simply do not violate one of the expressly enumerated rights granted the copyright holder by section one of the Copyright Act:

> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;
>
> (b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;
>
> (c) To deliver . . . the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof . . . and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. . . .
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof . . . and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and
>
> (e) To perform the copyrighted work publicly for profit if it be a musical composition; and . . . to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . . .

17 U.S.C. § 1 (1964).

109. *See* Blazon, Inc. v. DeLuxe Game Corp., 268 F. Supp. 416 (S.D.N.Y. 1965).

ular form of innocent behavior—independent creation of similar or virtually identical works of creative authorship—and is the corollary of the rule which governs obtaining a copyright. The requirement of originality[110] in copyright law is not a requirement of novelty or uniqueness of the work created.[111] Copyright will issue if the work owes its origin to the author registering it, which is to say when it is independently created rather than copied from other sources.[112] In infringement cases also, independent creation of the same work is protected. Therefore, to establish his cause of action, the plaintiff in an infringement case must prove copying,[113] or what the courts have come to treat as a satisfactory substitute: access and substantial similarity.[114] Where the putative infringer has had no access to the copyrighted material, he is not liable for infringement even where substantial similarity is shown between his work and that of the plaintiff.[115] But even where access and substantial similarity are shown, liability will not be imposed if the trier of fact is convinced that the defendant's work is indeed independent.[116] Thus, a producer of creative works will be exempt from liability except where the plaintiff copyright holder satisfies his burden of proving copying. The availability of many similar, but not copied, works is thereby assured, giving the public a choice and a large number of opportunities to be exposed to similar ideas.

Third, use of ideas or general plots and themes is not actionable in the absence of evidence of substantial piracy.[117] It is well established that abstract ideas are not protected by the copyright law,[118] and that vague plot or design ideas are also in the public domain.[119] While

110. The Act does not establish this doctrine explicitly, but the courts have used this requirement consistently. *See, e.g.*, DuPuy v. Post Telegram Co., 210 F. 883 (3d Cir. 1914).

111. Doran v. Sunset House Distrib. Corp., 197 F. Supp. 940 (S.D. Cal. 1961), *aff'd*, 304 F.2d 251 (9th Cir. 1962).

112. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951); *see* Wihtol v. Wells, 231 F.2d 550 (7th Cir. 1956); *cf.* Surgical Supply Serv. Inc. v. Adler, 206 F. Supp. 564 (E.D. Pa. 1962).

113. *See, e.g.*, Whitney v. Ross Jungnickel, Inc., 179 F. Supp. 751 (S.D.N.Y. 1960).

114. *See, e.g.*, Alexander v. Irving Trust Co., 132 F. Supp. 364 (S.D.N.Y. 1955), *aff'd*, 228 F.2d 221 (2d Cir. 1955).

115. Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F.2d 893 (8th Cir. 1946); Smith v. Berlin, 207 Misc. 862, 141 N.Y.S.2d 110 (N.Y. Sup. Ct. 1955).

116. Rosen v. Loew's Inc., 162 F.2d 785 (2d Cir. 1947); *see* Warshawsky v. Carter, 132 F. Supp. 758 (D.D.C. 1955).

117. *See* Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021 (2d Cir. 1966).

118. "Generally speaking, ideas are as free as the air . . . and as potent or weak, interesting or drab, as the experiences, philosophies, vocabularies, and other variables of the speaker and listener may combine to produce, to portray, or to comprehend." Desny v. Wilder, 46 Cal. 2d 715, 731; 299 P.2d 257, 265 (1956).

119. Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); Dymow v. Bolton, 11 F.2d 690 (2d Cir. 1926).

the line between merely lifting general ideas and substantial plagiarism of the actual expression of them is incredibly difficult to formulate,[120] the reasons for the idea exception are quite evident. The storehouse of useable knowledge and source materials for authors and the public in general would be greatly restricted if ideas were invested with property status. Science and the creative arts would be stifled rather than promoted if ideas were so restricted.[121] In addition, it is the abstract or general ideas which are most likely to be utilized unconsciously by authors in the creative process.[122] Themes and ideas from great or popular works are prominent parts of the environment in which creative persons ordinarily live. It is thus natural that the most general of these should be absorbed by many people and called forth in their own subsequent creations. The law generally seeks to impose liability only where substantial similarity[123] makes it evident that an attempt was made to steal the work of another.[124] This rule gives the copyright proprietor protection from deliberate piracy while encouraging the development and exploration of important ideas and themes by those who innocently encounter them and—with no intent to copy anyone's work —use them in their own works.

Fourth, absence of the copyright notice—the symbol © accompanied by the copyright date and proprietor's name—on a published work precludes recovery for the infringement thereof.[125] This doctrine has two distinct branches, which, though ordinarily considered quite separate, reflect the same concern. Initially, there is the basic rule of copyright law that publication of a work without notice of copyright divests the author of his exclusive rights.[126] The real rationale for this rule is not clear from the Supreme Court's landmark opinion in *Wheaton v. Peters*[127] or from later decisions, which merely reiterate the rule.[128]

Professor Nimmer suggests[129] that the underlying reason for the

120. See cases and commentary collected in M. NIMMER, *supra* note 11, § 143.11.

121. Becker v. Loew's Inc., 133 F.2d 889 (7th Cir. 1943).

122. *See generally* Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).

123. Alexander v. Irving Trust Co., 132 F. Supp. 364 (S.D.N.Y. 1955).

124. *But cf.* the "Dardanella" case, Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924).

125. See text accompanying notes 314-17 *infra.*

126. Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834); *see* Public Affairs Assoc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960).

127. 33 U.S. (8 Pet.) 591 (1834).

128. *See, e.g.*, Holmes v. Hurst, 174 U.S. 82 (1899); National Comics Publications v. Fawcett Publications, 191 F.2d 594 (2d Cir. 1951).

129. M. NIMMER, *supra* note 11, § 148.

rule is to be found in the fact that the Constitution only authorizes protection of author's writings "for limited times," and that the divestive publication rule is therefore a balance between the "interest of the authors in [continuing to reap] the fruits of their labor" and "the interest of the public in ultimately claiming free access to the materials essential to the development of society." This argument, however, appears to ignore important aspects of the Copyright Code. It would seem that this balance is actually struck by the establishment of the 56 year maximum term of copyright protection;[130] that is the provision of the Act that ultimately gnarantees public use of published material.

The rule of divestive publication, therefore, appears to be directed at a different end entirely. It resembles the doctrine of abandonment of copyright[131] but does not require proof of the intention to dedicate the work to the public as the defense of abandonment does.[132] Divestment by publication is a legally imposed forfeiture.[133] To the extent that there is any logic at all to the doctrine, beyond the fact that failure to affix notice may show an intent to abandon the work to the public, it must lie in the potential for reliance on the absence of warning by innocent recipients who copy the unmarked publication.

The second branch of the no-notice doctrine, applicable where copyright notice is accidentally omitted from a few copies of a published work, is straightforward evidence of this same concern for the innocent party who is misled by absence of any warning that the material he encounters is copyrighted. Section 21 of the Act [134] provides that accidental omission of the prescribed copyright notice deprives the copyright holder of the right to recover damages from an infringer who is misled by the absence of normal notice. This section even permits courts to require the copyright holder to reimburse an innocent in-

130. *See* 17 U.S.C. §§ 24 & 25 (1964).

131. *See* Hampton v. Paramount Pictures Corp., 279 F.2d 100 (9th Cir. 1960). *See generally* National Comics Publications v. Fawcett Publications, 191 F.2d 594 (2d Cir. 1951).

132. *See* National Comics Publications v. Fawcett Publications, 191 F.2d 594 (2d Cir. 1951).

133. Bobbs-Merrill Co. v. Strauss, 210 U.S. 339 (1908); White v. Kimmell, 193 F.2d 744 (9th Cir. 1952).

134. Where the copyright proprietor has sought to comply with the provisions of this title with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.
17 U.S.C. § 21 (1964).

fringer for reasonable outlays made in reliance on the uncopyrighted material. This careful insulation of innocent action evinces the law's commitment to protecting acts in reliance upon the apparent lack of copyright at the expense of an otherwise valid right.[135] Divestment of the entire copyright is not necessary to effectuate the prohibition of section 21 because it applies only where a few copies of the work are accidentally issued without notice. Innocent reliance here is protectable by individual exemption of the infringer and does not require invalidation of the copyright owner's rights entirely. The same concern and protection for innocent actors underlies the general rule of divestive publication. The basic purpose of both of these doctrines is to provide protection for innocent behavior.

Fifth, conduct which would otherwise constitute an infringement is not actionable if it falls within the judicially constructed fair use exemption to the Act.[136] The proposed revision to the Copyright Act recognizes[137] this exception and restates the tests articulated by the courts in this area:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified [in the section listing the copyright holder's exclusive rights], for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:
>
> (1) the purpose and character of the use;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.[138]

This proposed section reflects the concern which the courts have shown for insulation of a broad spectrum of activity which is innocent

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135. *See* Stecher Lithographic Co. v. Dunston Lithographic Co., 233 F. 601, 603 (W.D.N.Y. 1916); Sarony v. Burrow-Giles Lithographic Co., 17 F. 591, 592 (S.D.N.Y. 1883), *aff'd*, 111 U.S. 53 (1884).

At least one court has viewed innocent infringement where copyright notice was omitted as exempt from recovery of damages: "This defendant, upon actual notice of the copyright, ceased infringing. Down to that point he was an innocent infringer and not responsible in damages for prior infringement . . . ." Smith v. Wilkinson, 97 F.2d 506, 507 (1st Cir. 1938).

136. *See* Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT LAW SYMPOSIUM 43 (1955).

137. HOUSE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. No. 83, 90th Cong., 1st Sess. 32 (1967) [hereinafter cited as H.R. Rep. No. 83].

138. S. 543, 91st Cong., 1st Sess. § 107 (1969).

in one sense or another. Copying for teaching, scholarship, or criticism will ordinarily be done with full knowledge that the material is copyrighted. But a reviewer, for example, must often copy portions of his subject matter directly in order to make meaningful comments and criticism. Though he has no intent to infringe the copyright, and clearly does not represent the copyrighted material as his own creation, he may incur liability if the material copied is held to represent a substantial copying of the original.[139] This danger presents a problem of innocence in the sense that a reviewer has no intent to appropriate the copyright holder's material for his own advantage and does not know he is infringing. Teachers and researchers may also claim fair use in certain circumstances.

The purpose of the fair use exception in all these situations is explicitly not the advancement of learning per se—which is the purpose of the Code as a whole.[140] The report accompanying the present proposed revision acknowledges that fair use is to some extent antithetical to the author's incentive to create,[141] which is the ultimate source of advancement.[142] The beneficiaries of the fair use doctrine are those who are forced by the exigencies of time, money and circumstance to use copyrighted matter in technically infringing ways. They are innocent in the sense that their professions virtually require the behavior in question and they have no animus to unfairly capitalize on the proprietor's property. That much is true of all fair users. In addition, reviewers, critics and others who copy only small segments of the copyrighted material are innocent in the stronger sense that they do not intend to infringe and do not know that they are infringing, since that fact turns on judicial evaluation of the substantiality of the copying.[143]

Finally, innocent infringers are protected by the general principles of estoppel recognized in all branches of the law.[144] Therefore, where

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139. See text accompanying notes 117-24 *supra.*

140. See text accompanying notes 8-16 *supra.*

141. *See* H.R. Rep. No. 83 at 31.

142. See text accompanying notes 11-14 *supra.*

143. See text accompanying notes 117-24 *supra.* An indication of the relationship between the fair use doctrine and general protection for innocent infringers is found in section 504(c)(2) of the proposed revision to the Act:

> In a case where an instructor in a nonprofit educational institution, who infringed by reproducing a copyrighted work in copies or phonorecords for use in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction, sustains the burden of proving that he believed and has reasonable grounds for believing that the reproduction was a fair use under section 107, the court in its discretion may remit statutory damages in whole or in part.

S. 543, 91st Cong., 1st Sess. § 504(c)(2) (1969).

144. Hampton v. Paramount Pictures Corp., 279 F.2d 100 (9th Cir. 1960). (The requirements are: First, the party to be estopped must know of infringer's conduct;

the copyright proprietor aids the infringer or encourages his course of action, he cannot recover for the infringement.[145] Not only will inducing or causing the infringer's behavior deprive the copyright proprietor of his cause of action,[146] but conspicuous silence and inaction may in rare cases have the same result.[147] In all of these cases the infringement is committed innocently, by an actor who is misled by the copyright holder who encourages a given course of action.

II

PRESENT RULES OF MONETARY RECOVERY

It should be evident from the preceding discussion that while innocent behavior is protected by a number of different doctrines of copyright law, these doctrines do not by any means protect all cases of innocent infringement. The courts then face the task of shaping the appropriate remedy. The problem of the infringer who neither knows nor has any reason to know that he is infringing has presented a barrier of considerable magnitude to the development of coherent recovery rules.

In an effort to extend protection for the truly innocent infringer, the courts have attempted to give special advantages to such defendants in determining the extent of their liability. Since this practice has been juxtaposed with attempts to penalize deliberate infringers,[148] however, the result has been a sometimes confusing and often disunified system of recovery rules. Under the Copyright Act, the proprietor of an infringed copyright may recover the actual damages he suffers, the infringer's profits, or such damages in lieu of actual damages and profits as appear to the court to be just, within limits specified in the text of the statute.[149] Each of these three modes of recovery is the subject of a complicated set of rules, and each illustrates the concessions made to innocent infringers in the attempt to mitigate the severity of the strict liability principle.

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second, he must intend or reasonably appear to intend that his conduct be acted upon; third, the infringer must be ignorant of the true facts; fourth, the infringer must detrimentally rely on the conduct of the copyright proprietor.)

145. Heine v. Appleton, 11 F. Cas. 1031 (No. 6,324) (C.C.S.D.N.Y. 1857).

146. Curtis Publishing Co. v. Union Leader Corp., 12 F.R.D. 341 (D.N.H. 1952).

147. *See* Hampton v. Paramount Pictures Corp., 279 F.2d 100 (9th Cir. 1960); R.C.A. v. Premier Albums, Inc., 240 N.Y.S.2d 995 (App. Div. 1963).

148. See text accompanying notes 160-62 *infra.*

149. 17 U.S.C. § 101(b) (1964).

A. *Punitive and Defensive Uses of the Remedies*

The panoply of civil remedies for copyright infringement includes injunction against further infringement,[150] impounding[151] or destruction[152] of infringing matter, and monetary recovery.[153] In addition, criminal penalties may also be imposed under section 104, which makes it a misdemeanor to infringe a copyright "willfully and for profit."[154] Though this provision is rarely invoked in practice,[155] it serves the purpose of a criminal deterrent.[156]

In view of the separate criminal provision, it is often stated that the civil recovery provisions should be non-penal in nature.[157] The statutory damages section expressly states that awards made under it "shall not be regarded as a penalty,"[158] implying that the recovery should be purely compensatory, based on the harm done, and should should not vary with the culpability of the infringer as a criminal sanction would. Nevertheless, courts often consider the deterrent impact of a high recovery.[159] Thus, in cases of knowing or willful infringement, awards may go beyond mere compensation of the copyright proprietor in order to discourage infringement.

An example of this process is *Warren v. White & Wyckoff Mfg. Co.*,[160] where the court found that the defendant had infringed a copyright of the plaintiff in a promotional calendar it distributed, but observed that the plaintiff was not, nor could he have been, injured by the infringement. The court stated:

> [W]ere it not for the fact of the deliberate, unacknowledged, appropriation of material from plaintiff's book, I should be inclined to

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150. *Id.* §§ 101(a) & 112.
151. *Id.* § 101(c).
152. *Id.* § 101(d).
153. *Id.* § 101(b).
154. *Id.* § 104:
> Any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than $100 nor more than $1,000, or both, in the discretion of the court . . . .

155. M. NIMMER, *supra* note 11, § 162.
156. *Id.*
157. *See, e.g.*, Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399 (1940).
158. 17 U.S.C. § 101(b) (1964).
159. *E.g.*, F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952) (innocent vendor): "[A] rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule . . . is designed to discourage wrongful conduct."
160. 39 F.2d 922 (S.D.N.Y. 1930).

> treat the whole matter as a tempest in a teapot, and, while finding for plaintiff for the minimum statutory damages, let him have his trouble for his pains.
>
> . . .
>
> As a result of this unaccountable and inexcusable copying, plaintiff has found it necessary to institute this suit to bring the defendant to book, and it seems to me that, the defendant having led the plaintiff a dance over the matter, it, and not the plaintiff, ought to be made to pay the fiddlers and the scot.[161]

The court granted the plaintiff 1,000 dollars in statutory damages, all costs, and 1,000 dollars in attorney's fees.[162]

A converse pattern is evident when the courts are faced with innocent, non-injurious infringements. In such situations the courts have understandably hesitated to award even the very minimum prescribed by the statute, on the grounds that such an award would constitute an unwarranted penalty.[163] These protective interpretations of the Code, like the punitive awards, are often achieved by bending and interpreting the rules for establishing and measuring liability. The result is a sometimes confused body of rules governing liability for copyright infringement. Even where the rules are clear, it would seem that in applying them an attempt is made to excuse innocent infringers and penalize willful ones, despite the fact that the latter duplicates the criminal sanctions of the Act and that the former is an escape from—and not a solution to—the basic problem of imposing absolute liability on copyright infringers.

B. Actual Damages

The Code permits recovery of "[s]uch damages as the copyright proprietor may have suffered due to the infringement."[164] Reduction

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161. *Id.* at 923.

162. *Id.*; see also Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc., 184 F. Supp. 285 (E.D. Pa. 1960).

163. *E.g.*, M. Witmark & Sons v. Calloway, 22 F.2d 412 (E.D. Tenn. 1927); Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924); Altman v. New Haven Union Co., 254 F. 113 (D. Conn. 1918); *cf.* Barry v. Hughes, 103 F.2d 427 (2d Cir. 1939) (dicta).

164. 17 U.S.C. § 101(b) (1964). The history of the statutes authorizing recovery of damages for infringement in the United States is surveyed in W. STRAUSS, THE DAMAGE PROVISIONS OF THE COPYRIGHT LAW, STUDY NO. 22, SENATE COMM. ON THE JUDICIARY, 86TH CONG. 2D SESS., REPORT ON COPYRIGHT LAW REVISION 1-3 (Comm. Print. 1960).

The copyright statute of 1790 allowed the proprietor to recover fixed penalties, half of which were awarded to the federal government. Act of May 31, 1790, ch. 15, 1 Stat. 124. The penalties were not based on the copyright owner's injury, or on the number of infringing copies sold. Bolles v. Outing Co., 175 U.S. 262 (1899). After 1856, the proprietor was provided recovery of such damages as appeared just for infringement of a dramatic composition, but not less than 100 dollars for the first, and

in the value of the copyright is the basic measure of these damages.[165] It may result from loss of sales,[166] loss of novelty,[167] loss of recognition as an author or creator,[168] or even increased business expenses caused by the infringement.[169] The court exercises discretion in determining the damages to be awarded to a copyright owner, making its determination by estimation where necessary.[170] But despite the opportunity to use experts and appoint a special master,[171] it is frequently very difficult to prove actual damages.[172] And since the determination of damages

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50 dollars for every subsequent infringing performance. REV. STAT. § 4966 (1875). The amendment of 1870 permitted recovery of actual damages for infringement of a copyrighted book. Act of July 8, 1870, ch. 230, 16 Stat. 198.

The antecedent of the American laws was the English Statute of Anne, 8 Anne, c. 19 (1710), establishing a 14-year period of copyright protection and damages of a penny per sheet for infringement to be split between the copyright proprietor and the Queen.

165. *See* Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947).

166. Sammons v. Colonial Press, Inc., 126 F.2d 341, 344 (1st Cir. 1942); Gross v. Van Dyk Gravure Co., 230 F. 412 (2d Cr. 1916); *see* Ziegelheim v. Flohr, 119 F. Supp. 324 (E.D.N.Y. 1954); Atlantic Monthly Co. v. Post Publishing Co., 27 F.2d 556, 560 (D. Mass. 1928).

In Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc., 329 F.2d 194 (2d Cir. 1964), the court refused to accept the infringer's profits as an accurate measure of plaintiff's lost sales and profits because "the evidence indicated that the parties sold fabric of different quality at different prices in what appeared to be a different market." *Id.* at 196.

167. *See, e.g.*, Sebring Pottery Co. v. Steubenville Pottery Co., 9 F. Supp. 384, 385 (N.D. Ohio 1934).

168. Stodart v. Mutual Film Corp., 249 F. 507, 511 (S.D.N.Y. 1917).

169. Atlantic Monthly Co. v. Post Publishing Co., 27 F.2d 556, 560 (D. Mass. 1928). In Sammons v. Colonial Press, 126 F.2d 341 (1st Cir. 1942), the court indicated that an award of damages to a successful plaintiff would be reduced if the infringer could establish that the proprietor had either made no effort to use his copyright, in which case he could not have been deprived of any actual gain, or that the copyrighted book was an expensive edition and the infringing work a cheap edition. Thus, the profits from the infringement might well have come from sales in a market which the plaintiff would not have tapped anyway. *Cf.* Huebsch v. Arthur H. Crist Co., 209 F. 885, 894 (N.D.N.Y. 1914).

170. Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 375 (9th Cir. 1947).

171. *See generally id.* at 368-69. It has been argued that the expense of employing expert testimony may limit its use to cases where the amounts involved are large. *See* W. BROWN, *supra* note 93, at 70.

172. Brady v. Daly, 175 U.S. 148, 154 (1899). *See* Widenski v. Shapiro, Bernstein & Co., 147 F.2d 909 (1st Cir. 1945); Sammons v. Colonial Press, 126 F.2d 341, 344 (1st Cir. 1942).

> One shortcoming of actual damages as a remedy . . . is the supposed difficulty in computing them. Since works subject to copyright are by and large differentiated from each other, it is difficult to establish values. If the value of the work before the infringement and its diminished value afterward are sought, in accordance with one approved technique of damage law, two valuations are necessary. Or, if the plaintiff's lost profits are proposed as a measure of his damages, there is the problem of establishing with reasonable certainty what they would have been.

W. BROWN, *supra* note 93, at 69.

is subjective, there is room for the court to maneuver to protect innocent infringers and penalize willful ones.[173]

Innocent infringers are accorded special treatment when damages are determined. The long-accepted rule has been that all who participate in an infringement are jointly and severally liable to the proprietor for the damages sustained therefrom.[174] From this rule the courts have carved out some protection for innocent infringers. The early pattern in this area is exemplified by *Detective Comics, Inc. v. Bruns Publications*,[175] where the court found infringement and joint liability. Enforcement of the judgment was modified against the innocent distributors of the infringing items, however, so that their liability was restricted to the amount of the damages above what the principal infringer could pay.

In some later cases the courts took an even bolder stance. It has been noted[176] that in *Northern Music Corp. v. King Record Distributing Co.*,[177] the corporate defendants had made and distributed recordings of a song actually copied by other defendants from the plaintiff's copyrighted composition. The corporate infringers had no knowledge or reason to know of the plaintiff's copyright and were held liable only for that portion of the damage attributable to their individual infringements of plaintiff's copyright. And in *Gordon v. Weir*,[178] the court refused to hold innocent infringers, misled by a certificate of copyright registration issued to the original willful infringer, liable for the damages inflicted by the original infringer.

While there are, of course, decisions which retain the old rule,[179] *Northern Music* and *Gordon* point in a slightly different direction. In some respects they take up the view expressed in Judge Learned Hand's dissent in *De Acosta*[180] that where the infringement was an innocent publication, an injunction and recovery of the infringer's profits were appropriate but an award of damages was not.[181] At present, the abolition of joint and several liability is not by any means clear-cut and no other aspects of the recovery rules have yet been reshaped

173. See text accompanying notes 150-66 *supra*; the court is not bound to award actual damages. Widenski v. Shapiro, Bernstein & Co., 147 F.2d 909 (1st Cir. 1945).

174. A. LATMAN & W. TAGER, *supra* note 36, at 146; *see* Comment, *Joint and Several Liability for Copyright Infringement: A New Look at Section 101(b) of the Copyright Act*, 32 U. CHI. L. REV. 98 (1964).

175. 111 F.2d 432 (2d Cir. 1940).

176. A. LATMAN & W. TAGER, *supra* note 36, at 147.

177. 105 F. Supp. 393 (S.D.N.Y. 1952).

178. 111 F. Supp. 117 (E.D. Mich. 1953), *aff'd*, 216 F.2d 508 (6th Cir. 1954).

179. *See, e.g.*, Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260 (2d Cir. 1957).

180. De Acosta v. Brown, 146 F.2d 408 (2d Cir. 1944).

181. *Id.* at 412-14.

to further the protective policies these cases support. Certain provisions of the Code, however, do reflect similar concerns.

Two sections of the Code limit recovery of damages from innocent infringers. Section 1(c) places a 100 dollar maximum on damages for an innocent public broadcast of a lecture, sermon, speech or other non-dramatic literary work "where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen."[182] Section 21 provides that in the special situation where notice of copyright is omitted, an infringer who is misled by the absence of such notice shall not be subject to recovery of the proprietor's damages.[183] The rationale for these exceptions, which apply only in the absence of intention or negligence, is presumably that there is no way to deter someone from being innocently misled into copying protected material.[184] This reasoning, however, is not applicable solely to cases of omitted notice of copyright; it applies equally to the larger problem of innocent infringement generally since in each case the infringer does not know of or intend to commit the infringement, and he may often have no reason to know of it.[185] He is already exercising reasonable care in his actions. Still, at present these two sections and parts of Section 101 constitute the only attempts in the Act to limit the liability of innocent infringers.

An alternative to the lost sales/value standard of computing damages for copyright infringement is suggested by the "reasonable royalty" standard applied in patent infringement actions when actual damages are difficult to prove. The theory of such recovery is that the damage to the proprietor has been caused by the infringer's use of the patented item without due compensation.[186] This measure of recovery was employed in at least one copyright case, where the award was measured by the amount the infringing newspaper company should have been willing to pay for exclusive first publication rights to the plaintiff's article.[187] The use of prior or related contracts,[188] or prior negotiations thereon,[189] in setting an award is an analogous practice. One circuit has held the "in lieu" clause[190] of the Act to be an

182. 17 U.S.C. § 1(c) (1964).

183. *Id.* § 21. See text accompanying notes 131-35 *supra.*

184. See text accompanying note 135 *supra.*

185. *See* text accompanying notes 290-91 *infra.*

186. Enterprise Mfg. Co. v. Shakespeare Co., 141 F.2d 916 (6th Cir. 1944).

187. Atlantic Monthly Co. v. Post Publishing Co., 27 F.2d 556 (D. Mass. 1928).

188. Szekely v. Eagle Lion Films, Inc., 242 F.2d 266 (2d Cir. 1957).

189. *Cf.* Gordon v. Weir, 111 F. Supp. 117 (E.D. Mich. 1953); Advertisers Exchange v. Hinkley, 101 F. Supp. 801 (W.D. Mo. 1951).

190. 17 U.S.C. § 101(b) (1964). The infringer is liable for actual damages and profits "or in lieu of actual damages and profits, such damages as to the court shall appear to be just . . . ." See text accompanying notes 247-97 *infra.*

exclusive substitute for the reasonable royalty standard where actual damages and profits could not be ascertained.[191] However, it would seem that in damage actions there is no substantial problem in awarding actual damages measured by a reasonable license fee[192] for the use of copyrighted matter where trade usage or other factors make a fair determination possible.[193]

The proposed revision of the Code does not expand upon the present Act's simple actual damages provision.[194] No statement is made about joint and several liability for infringement, thus leaving intact, and still disunified, the various judge-made doctrines partially protecting innocent infringers. The revision has no provision parallel to the 100 dollar innocent broadcaster provision of the present Act,[195] but it does insulate innocent infringers in cases where notice has been left off of a copyrighted item.[196]

C. *Infringer's Profits*

Section 101(b) of the Act permits recovery of all profits which an infringer makes from the infringement.[197] Techniques used in computing the profits authorized for recovery under the Act again illustrate the pattern of sub rosa utilization of the willful-innocent infringer distinction to make the Code more responsive to the felt equities of the fact sitations before the court.

The basic theory underlying the award of an infringer's profits is that it would be unconscionable to permit the infringer to benefit from his wrongful taking of the copyright owner's right.[198] This unjust enrichment standard[199] is not designed to make the copyright owner whole; it is computed quite differently than a damage measure would

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191. Widenski v. Shapiro, Bernstein & Co., 147 F.2d 909 (1st Cir. 1945).

192. See text accompanying notes 318-20 *infra.*

193. *See generally* Enterprise Mfg. Co. v. Shakespeare Co., 141 F.2d 916 (6th Cir. 1944).

194. *See* S. 543, 91st Cong., 1st Sess. § 504 (1969).

195. *See* H.R. REP. No. 83, at 165; see text accompanying notes 183-84 *supra.*

196. See text accompanying notes 314-16 *infra.*

197. 17 U.S.C. § 101(b) (1964).

198. Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399 (1940); Sammons v. Colonial Press, 126 F.2d 341, 344-46 (1st Cir. 1942); *see* F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952).

199. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 86 F. Supp. 399, 403 (S.D.N.Y. 1949), *modified on other grounds,* 191 F.2d 99 (2d Cir. 1951). In Sammons v. Colonial Press, 126 F.2d 341 (1st Cir. 1942), the court emphasized that it was concerned with "ill gotten gains . . . . Accountability for profits is therefore peculiarly personal, as equity acts on the conscience of the infringer. The presupposition is that the infringer has gotten something which it is unconscionable for him to keep . . . ." *Id.* at 345.

be.[200] That the plaintiff could have made more or less profit than the defendant is irrelevant.[201]

Section 101(b) of the Act also provides that the copyright proprietor need only prove gross sales of the infringing articles.[202] The infringer must prove deductible costs or the court will grant recovery equal to the entire amount of gross sales.[203] The basic deduction allowed the infringer is that of manufacturing costs.[204] This includes the cost of material used, labor, and overhead expenses to the extent that they are logically allocable to the production of the infringing items.[205]

The costs of production are strictly construed. An infringer, for example, may only deduct costs for goods actually sold,[206] regardless

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200. See text accompanying notes 242-43 *infra*.

201. *See* Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 400 (1940); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 86 F. Supp. 399, 405, 411-13 (S.D.N.Y. 1949).

202. 17 U.S.C. § 101(b) (1964).

203. *See* F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 230 (1952).

204. *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 86 F. Supp. 399, 413 (S.D.N.Y. 1949).

205. *See id.* The cases in which much of the doctrine covering deductible costs was developed were predominantly instances of willful infringement. The rule on labor costs illustrates the harsh doctrine which has been shaped in response to these violations. While salaries of employees may be deducted to determine net profits, that of the infringer himself may not. Callaghan v. Meyers, 128 U.S. 617, 664 (1888). No distinction is drawn between infringers, whether they be large firms or single individuals, willful or innocent copyright violators. The Court in *Callaghan* stated the principle bluntly:

> We do not think that the value of the time of an infringer, or the expense of the living of himself or his family, while he is engaged in violating the rights of the plaintiff, is to be allowed to him as a credit, and thus the plaintiff be compelled to pay the defendant for his time and expenses while engaged in infringing the copyright.

Id. Salaries of employees and corporate executives are said to be "on a different footing" [*id.*] and may be deducted. The rule permits deduction only for things which the infringer has "bought and paid for . . . ." Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 51 (2d Cir. 1939). Without regard to the fact that innocent copyright infringers have no way to avoid violation of the proprietor's rights, and that all small infringers may be dealt crushing blows by this rule, Judge Hand reiterated the Supreme Court's position, noting that "a plagiarist may not charge for his labor in exploiting what he has taken." *Id.*

It could be argued that an infringer would have utilized his efforts in some profitable manner had he not devoted it to the infringing enterprise. Especially in cases of innocent infringement, therefore, he would not be unjustly enriched if permitted to deduct a reasonable salary as a cost. The same argument could be advanced for allowing deduction of a reasonable interest charge on the money he invested in the project. At present, however, these items are not recognized as valid deductions.

206. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 86 F. Supp. 399, 411-13 (S.D. N.Y. 1949) (deduction allowed for less than half of the production costs where only 10,000 of 21,000 copies made were actually sold). *Cf.* Hartford Printing Co. v. Hartford Directory & Publishing Co., 146 F. 332 (C.C.D. Conn. 1906).

of the amount spent in producing material which remained unsold. So, rather than treating the infringement enterprise as a single course of action, it is viewed as severable. The court's explanation of this rule is that since the copyright proprietor is limited to items actually sold in proving gross sales, the infringer should be limited to items sold in determining costs.[207] Since avoiding unjust enrichment is the rationale for permitting recovery of profits in the first place, this view is not persuasive. All items produced, whether sold or not at the time of the suit, contribute to expenses and thereby reduce the infringer's enrichment. The present rule penalizes the infringer in spite of the frequent statements in the Act and in court decisions that enforcement of the Code through civil remedies should not be viewed as a punitive program.[208]

Costs such as overhead expenses must be apportioned in cases where the infringer is engaged in projects in addition to the one challenged in the suit before the court.[209] The approach of the courts in such cases is most clearly illustrated in *Alfred Bell v. Catalda Fine Arts, Inc.*,[210] where the defendant made copies of several mezzotint engraved prints of famous paintings, infringing plaintiff's copyrights on the prints. The court held rent to be a proper item of deductible expense in computing the infringer's profits so long as it actually aided in the production of the infringing items.[211] The infringer must establish the approximate proportion of such expenses which relate to the infringing articles, deduction being limited to that fraction of the total expenses.[212]

In *Sammons v. Colonial Press*,[213] the court suggested[214] that only innocent infringers may deduct overhead expenses. While no other case has argued for such a rule as to overhead, it is accepted as to the deductibility of income tax in computing net profits.[215] The Supreme

207. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 86 F. Supp. 399, 413 (S.D.N.Y. 1949).

208. See note 154 *supra*.

209. The courts in copyright cases have repeatedly cited Levin Bros. v. Davis Mfg. Co., 72 F.2d 163, 166 (8th Cir. 1934) (patent infringement) as stating the applicable rule.

210. 86 F. Supp. 399 (S.D.N.Y. 1949), *modified on other grounds*, 191 F.2d 99 (2d Cir. 1951).

211. 86 F. Supp. at 406.

212. Sammons v. Colonial Press, 126 F.2d 341, 349 (1st Cir. 1942).

213. 126 F.2d 341 (1st Cir. 1942).

214. *Id.* at 348-49.

215. Deliberate infringers were denied this deduction in Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 106 (2d Cir. 1951), and Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 53 (2d Cir. 1939), while the innocent infringer was allowed the deduction in Sheldon v. Moredall Realty Corp., 29 F. Supp. 729 (S.D.N.Y. 1939).

Court dealt with the issue in the cognate context of unfair competition in *L. P. Larson, Jr. Co. v. William Wrigley, Jr. Co.*,[216] where it considered the liability of a willful infringer. The Court stressed that in deciding whether income tax payments could be subtracted along with other expenses to determine net profits, it looked to the knowledge and conduct of the infringer,[217] suggesting that only innocent infringers would be permitted this subtraction.

It has been suggested that copyright protection is better served by elimination of the deduction for tax payments altogether,[218] but in any event, selective permission to subtract the tax is an apparent attempt to use the civil non-penalty provisions of the Code as a penalty for intentional infringement.

Frequently, in addition to the computation difficulties discussed above, the contribution made by the infringing matter must be estimated to determine what fraction of the infringer's profits derive from the infringement of copyrighted material, and what fraction from his own expertise or creative contributions, since the plaintiff may only recover that portion of the profit attributable to the infringement.[219]

The burden of proving that profits from an infringing enterprise can be apportioned rests on the infringer.[220] Failure to establish apportionability will result in forfeiture of all profits from the whole enterprise,[221] but the infringer need only provide enough evidence for some rational apportionment.[222] Any uncertainty, of course, will be resolved in the copyright holder's favor since the court's primary concern is that the award be sufficient to protect him.[223]

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216. 277 U.S. 97 (1928) (unfair competition).

217. *Id.* at 99-100.

218. Comment, *Monetary Recovery Under the Copyright, Patent, and Trademark Acts*, 45 TEX. L. REV. 953, 959-60 (1967).

219. The Act permits recovery of "such damages as the copyright proprietor may have suffered *due to the infringement.*" 17 U.S.C. § 101(b) (1964) (emphasis added). *See* Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 404-06 (1940). Prior to the *Sheldon* case profits were generally not apportioned. *See, e.g.*, Callaghan v. Meyers, 128 U.S. 617, 665-66 (1888). The rule of apportionability of profits is now settled but it "has been suggested that a rule of apportionment, by softening the remedy, encourages people to infringe . . . ." On the other hand, however, there is the possibility that this rule "may seduce judges into finding infringement in dubious cases by holding out some assurance that the defendant will anyway not be hit too hard." B. KAPLAN, *supra* note 2, at 71.

220. Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 406 (1940).

221. *Id.*

222. *Id.* at 402 (fair basis for apportionment); Orgel v. Clark Boardman Co., 301 F.2d 119, 122 (2d Cir. 1961), *cert. denied*, 371 U.S. 817 (1962) (rational apportionment); Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579, 584 (9th Cir. 1944) (reasonable apportionment); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 86 F. Supp. 399, 410 (S.D.N.Y. 1949) (rational separation).

223. *See* Orgel v. Clark Boardman Co., 301 F.2d 119, 121-22 (2d Cir. 1961),

The proposed revision would make two changes in this area of the law. First, it codifies the present practice that in calculating recoverable profits, the plaintiff must not get double recovery by counting the infringer's sales as an element of actual damages and again as part of the infringer's profits.[224] Second, while maintaining the provision that the proprietor need only prove gross revenues, the proposed law specifies that an infringer may prove "his deductible expenses."[225] Present law permits subtraction of "deductible costs," and the Register of Copyrights suggests that this revision implies a broader scope of permissible deduction.[226] In any event, the revision does not clarify or approve the use by the courts of the innocent-willful distinction as applied to overhead or income taxes, and the general rules on apportionment are retained.

D. Damages, Profits or Both

There is an unfortunate ambiguity in the text of the 1909 Act which has led to widely divergent applications of the statute in awards by the courts. Section 101(b) requires an infringer to pay the copyright proprietor such damages as the infringement caused *as well as* all the profits the infringer makes from it.[227] It is evident from the congressional report accompanying the 1909 Act that the Congress intended to enact a provision similar to that governing patent infringement recovery at that time; that is, that the proprietor was to recover either damages or the infringer's profits, whichever was greater.[228] But the language has been followed literally by some courts, which have awarded damages and profits cumulatively.[229] Other courts have re-

cert. denied, 371 U.S. 817 (1962); Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 51 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940).

224. S. 543, 91st Cong., 1st Sess. § 504(b): "The copyright owner is entitled to recover the actual damages suffered by him as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."

225. *Id.*

226. REGISTER OF COPYRIGHTS, HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS. REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 102 (Comm. Priut 1961) [hereinafter cited as REGISTER'S REPORT].

227. 17 U.S.C. § 101(b) (1964).

228. H.R. REP. No. 2222, 60th Cong., 2d Sess. 15 (1909):

> The provision that the copyright proprietor may have such damages as well as the profits which the infringer shall have made is substantially the same provision found in section 4921 of the Revised Statutes relating to remedies for the infringement of patents. The courts have usually construed that to mean that the owner of the patent might have one or the other, whichever was the greater. As such provision was found both in the trademark and pateut laws, the committee felt that it might be properly in the copyright laws.

229. *E.g.*, Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc., 329 F.2d 194 (2d Cir. 1964); *see* Ziegelheim v. Flohr, 119 F. Supp. 324 (E.D.N.Y. 1954); *cf.* De Acosta v. Brown, 146 F.2d 408 (2d Cir. 1944).

stricted recovery to the larger of the two.[230] Once again, the cases of innocent infringement are treated under the most indulgent rule,[231] while willful infringers most frequently are subject to cumulative damage and profits awards.

In *Sheldon v. Metro-Goldwyn Corp.*,[232] the Supreme Court referred to the 1909 committee report on the Copyright Act and, accordingly, held that the plaintiff was entitled to recover only profits *or* damages, whichever was greater, and not a combination of the two. Twelve years later, however, the Court decided *F.W. Woolworth Co. v. Contemporary Arts, Inc.*,[233] which concerned liability for the innocent vending of infringing statuettes. The Court rejected defendant's assertion that since its profits were readily ascertainable, the proprietor was precluded from seeking recovery for damages above this figure.[234] The Court noted that "a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers."[235] Some writers[236] and courts[237] apparently view the *Woolworth* decision as authorizing cumulative recovery of damages and profits. Such a reading of the opinion is not patently false, but the case's status as an authority for that proposition is clouded. Though the district court had allowed recovery of 900 dollars in infringer's profits and 4100 dollars in "in lieu" damages,[238] the Supreme Court affirmed the judgment as a simple award of the statutory maximum of 5,000 dollars under the "in lieu" clause.[239] Thus, it is not clear that the Court viewed the matter as one of cumulative award.

Cumulative recovery of damages and profits raises several serious problems. It is sometimes argued that cumulative awards may result in a double recovery for the same infringing sale.[240] It is possible,

230. *E.g.*, F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947); *see* Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 400-01 (1940) (dictum); Gordon v. Weir, 111 F. Supp. 117 (E.D. Mich. 1953), *aff'd mem.*, 216 F.2d 508 (6th Cir. 1954).

231. *But cf.* F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952) (liability of innocent infringer for 5,000 dollar maximum award upheld).

232. 309 U.S. 390, 400-01 (1940).

233. 344 U.S. 228 (1952).

234. *Id.* at 233.

235. *Id.*

236. *E.g.*, Price, *Monetary Remedies Under the United States Copyright Code*, 27 FORDHAM L. REV. 555, 564 (1959).

237. *E.g.*, Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc., 329 F.2d 194 (2d Cir. 1964); Ziegelheim v. Flohr, 119 F. Supp. 324 (E.D.N.Y. 1954).

238. *See* F.W. Woolworth v. Contemporary Arts, Inc., 193 F.2d 162, 169 (1st Cir. 1951).

239. *See* 344 U.S. 228, 229-31 (1952).

240. *See* Note, 67 HARV. L. REV. 1044, 1051-52 (1954).

however, within the terms of the Act to work out a scheme preventing this result,[241] and in any event only in rare cases will computation of plaintiff's damages overlap areas of defendant's profits.[242] In fact, some courts have recognized that the different nature of damages and profits calls for entirely separate legal principles on which to base their award.[243]

More substantial doubts about the fairness of such a recovery are raised by analysis of the goals of the law in this area. While actual damages are awarded to compensate for loss, the theory behind recovery of profits is that it prevents unjust enrichment.[244] In view of this rationale, it is difficult to justify cumulative recovery. If, for example, the copyright proprietor sustains damages amounting to 1,000 dollars, and the infringer has profits of 1,500 dollars, the recovery would be 2,500 dollars on the cumulative theory. This seems to be a penal recovery in conflict with the express intention of the Act that civil recovery be non-penal. If the infringer is held to answer for 1,000 dollars in damages, his enrichment amounts to only 500 dollars and therefore a total award of 1,500 dollars would prevent any unjust enrichment.[245]

The revision bill clarifies the law in this area by holding an infringer liable for "the copyright owner's actual damages and any *additional* profits of the infringer."[246] This provision, combined with the new proposal's explanation that only profits which are not computed in plaintiff's damages are subject to recovery, eliminates the ambiguity in the present text and the consequent diverging practices of the courts. This rule is not necessary to protect the copyright holder, since dam-

241. *See generally* M. NIMMER, *supra* note 11, § 151.

242. *See generally* Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc., 329 F.2d 194, 196 (2d Cir. 1964).

243. Sammons v. Colonial Press, 126 F.2d 341, 344 (1st Cir. 1942). In Lundberg v. Welles, 93 F. Supp. 359 (S.D.N.Y. 1950), plaintiff sought damages for infringement of the book *Imperial Hearst* by the production and distribution of the motion picture *Citizen Kane*. The court, discussing recovery of profits in an action at law, noted:

> The theory by which profits may be recovered in a suit in equity emanates from antecedents that are wholly distinct from those which attend the recovery of damages in an actiou at law. The two are not only separable in principle, but also in the consequences flowing therefrom. . . . Damages are measured by the loss to the plaintiff whose rights have been infringed; profits express the actual gains accruing to the defendant by virtue of his infringement. . . .

Id. at 361.

244. Sammons v. Colonial Press, 126 F.2d 341, 345 (1st Cir. 1942).

245. Assuming that there is no overlap in the computation of damages (plaintiff's lost sales) and profits (defendant's sales). *See* Note, *supra* note 240, at 1050.

246. S. 543, 91st Cong., 1st Sess. § 504(a)(1) (1964) (emphasis added).

ages alone would compensate his loss. The excess of recovery above his damages represents a windfall for the proprietor. This seems generally less objectionable than allowing unjust enrichment of a wrongful infringer. But in cases of innocent infringement the recovery of any amount beyond the plaintiff's damages appears unwarranted; here we are not concerned that the infringer may be encouraged by his gain. The economic hardship caused by forfeiture of profits in such cases serves no purpose, since as an innocent infringer he is not a pirate in the first place and cannot be deterred.

E. Statutory Damages

The copyright proprietor may receive in lieu of actual damages or the infringer's profits a third measure of recovery, statutory damages.[247] This remedy was provided in the Act because of the difficulty frequently encountered in proving actual damages or infringement profits, a difficulty which threatened the basic goal of monetary recovery: compensation of the copyright owner. As the Supreme Court said in *Douglas v. Cunningham*:[248]

> The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect the old law was unsatisfactory. In many cases plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged willful and deliberate infringement.[249]

This passage suggests two independent grounds upon which the award of statutory damages might be justified. First, statutory recovery may be awarded to deter infringement and to cover the costs of policing and stopping infringement in cases where the actual damages or infringement profits are nominal; second, such awards help assure adequate compensation in those cases where it is difficult or impossible to accurately determine the extent of injury to the copyright holder.[250]

The Act provides for recovery in lieu of proof of actual damages or the infringer's profits of "such damages as to the court shall appear

247. 17 U.S.C. § 101(b) (1964).

248. 294 U.S. 207 (1935).

249. *Id.* at 209; Brady v. Daly, 175 U.S. 148, 154 (1899): "In the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case . . . ."

250. See text accompanying notes 170-73 *supra.*

to be just . . . ."[251] It attempts to set dollar limits on the courts' "sense of justice"[252] by establishing maximum and minimum awards for certain types of infringements[253] and by providing a fixed schedule of recovery for other categories of works.[254] The Act specifies that statutory damages "shall not be regarded as a penalty."[255] But the establishment of minimum recoveries for infringement, not based on a determination of harm to the copyright owner, may have a penal character since in many cases where a recovery is assessed there is no pretense that it is needed as a compensatory device.

With the exception of the 250 dollar minimum award, the actual figures prescribed by the Act have been held not binding on the courts;[256] they merely aid the court in determining a just award.[257] However, appellate courts will not review the fairness of an award of statutory damages if the trial court has followed the standard schedules in the Act.[258]

Since the statutory amount is recoverable for each separate infringement,[259] the problem of distinguishing single from multiple infringements becomes an especially important threshold issue in assessing statutory damages. The infringement of a number of different copyrighted works raises no such problem since each separate work infringed gives rise to a distinct cause of action.[260] The difficult question arises when a single copyrighted work is infringed by a complex course of action. Professor Nimmer suggests that the time element determines whether the infringement is treated by the courts as one transaction or

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251. 17 U.S.C. § 101(b) (1964).

252. L.A. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100, 106 (1919).

253. See text accompanying notes 287-91 *infra*.

254. First. In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer . . . .

Second. In the case of any work enumerated in section 5 of this title, execpt a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer . . . .

Third. In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first aud $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance;

17 U.S.C. § 101(b) (1964).

255. *Id.*

256. Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260, 265 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958).

257. Jewell-LaSalle Realty Co. v. Buck, 283 U.S. 202, 207 (1931).

258. Douglas v. Cunningham, 294 U.S. 207, 210 (1935).

259. *See* L.A. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100 (1919).

260. *Id.* The special circumstances posed by cable television systems may greatly complicate such a determination, however. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

a series of separately actionable wrongs.[261] Where multiple copies are made of a copyrighted book, for example, the courts generally find a single infringement if the printings occur within a matter of days, but separate infringements if the infringing publications are more than a few days apart.[262]

While the proposed revision is generally silent on the issue of the number of infringements, it does specify that the statutory recovery guidelines are applicable "with respect to any one work."[263] This provision rules out computation of recovery on the basis of the number of copyrights, exclusive rights violated, owners, or registrations involved. The number of underlying works infringed is the guide, and the bill further clarifies this point by stipulating that "[f]or the purposes of this subsection, all the parts of a compilation or derivative work constitute one work."[264]

Even where determination of the number of infringements has not posed a problem, confusion over the basic ground rules for the award of statutory damages has plagued the courts. The most troublesome question is whether actual damages and the infringer's profits must be unascertainable before statutory recovery may be awarded. The statute itself merely says that statutory damages may be awarded "in lieu" of actual damages or profits.[265] The Supreme Court appears to have vacillated on this issue, and its more recent position is not uniformly reflected in the practices of the lower courts. In 1935 the Court in *Douglas*[266] indicated that the statutory schedule of damages was intended for use only when both the proprietor's actual injury and the infringer's profits were not determinable.[267] Accordingly, many courts

261. M. NIMMER, *supra* note 11, § 154.32.

262. *Id.* At least one court has indicated that it weighed the innocence (or good faith) of the infringer in determining whether the infringement was single or multiple. Sauer v. Detroit Times Co., 247 F. 687 (E.D. Mich. 1917).

263. S. 543, 91st Cong., 1st Sess. § 504(c)(1) (1969).

264. *Id.*

265. 17 U.S.C. § 101(b) (1964).

266. 294 U.S. 207 (1935).

267. *Id.* at 209. Similarly, where it has been affirmatively shown that the copyright holder suffered no injury and the infringer made no profit, some courts have refused to sanction an award of statutory damages. Washingtonian Publishing Co. v. Pearson, 140 F.2d 465 (D.C. Cir. 1944). In Malsed v. Marshall Field & Co., 88 U.S.P.Q. 552 (W.D. Wash. 1951), the Court outlined this principle:

> [I]n order that the "in lieu" provision be resorted to, there must be difficulty or impossibility of computing *both* damages and profits. Or, differently put, if profits are ascertainable, the minimum provided in the "in lieu" provision *need not* be resorted to. . . . Theoretically, in a proper case, both damages and profits are recoverable. But when the plaintiff has suffered no damages, and the profits are ascertainable, to resort to the "in lieu" clause . . . would amount to the imposition of a penalty. And the "in lieu" provision has been declared . . . *not to be such*, but rather, the equitable substitute for cases which present difficulty or impossibility of proof as to damages and

only award statutory damages when it is impossible to ascertain the actual damage or profit figures,[268] and there is language in some decisions specifically refusing to sanction statutory recovery except in such circumstances.[269] In the *Woolworth* case,[270] the Supreme Court in 1952 rejected the infringer's argument that his admissions as to profits precluded an award of statutory damages.[271] The Court stressed the need to preserve the discretion of the trial court to choose either actual profits and damages or statutory recovery in order to shape a more just decision.[272] The apparent impetus for this ruling was the fear that in cases similar to the one before the Court, an infringement which did not result in much net profit for the wrongdoer could nevertheless injure the copyright owner substantially. In such a situation the infringer's admission of his profits, if held to preclude statutory damages, might deny full compensation to the proprietor. However, this fear is groundless where the owner's damages and the infringer's profits are both known. Perhaps for this reason, the *Woolworth* Court required as a prerequisite to the award of statutory damages that either actual damages or the infringer's profits be undetermined.[273]

Rendering the infringing enterprise profitless is a severe blow, especially since in small operations the infringer is not allowed to de-

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profits.

Id. at 554. *See also* Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950); Atlantic Monthly Co. v. Post Publishing Co., 27 F.2d 556 (D. Mass. 1928).

268. Gordon v. Weir, 111 F. Supp. 117, 123 (E.D. Mich. 1953); Sebring Pottery Co. v. Steubenville Pottery Co., 9 F. Supp. 384, 390 (N.D. Ohio 1934); *see* Jewell-LaSalle Realty Co. v. Buck, 283 U.S. 202, 208 (1931); Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260, 265 (2d Cir. 1957).

269. Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399 (1940); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 378 (9th Cir. 1947); Davilla v. Brunswick-Balke Collender Co., 94 F.2d 567, 568-70 (2d Cir. 1938).

270. F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952).

271. It is plain that the court's choice between a computed measure of damage and that imputed by the statute cannot be controlled by the infringer's admission of his profits which might be greatly exceeded by the damage inflicted. . . . In this case the profits realized were established by uncontradicted evidence, but the court was within the bounds of its discretion in concluding that the amount of damages suffered was not computable from the testimony. Lack of adequate proof on either element would warrant resort to the statute in the discretion of the court, subject always to the statutory limitations.

Id. at 232-33.

272. "We think that the statute empowers the trial court in its sound exercise of judicial discretion to determine whether on all the facts a recovery upon proven profits and damages or one estimated within the statutory limits is more just." *Id.* at 234.

273. "Whether discretionary resort to estimation of statutory damages is just should be determined by taking into account both components and the difficulties in the way of proof of either. . . . Lack of adequate proof on either element would warrant resort to the statute in the discretion of the court . . . ." *Id.* at 232-33. *Cf.* Greenfield v. Tanzer, 125 U.S.P.Q. 392 (D. Mass. 1960).

duct his salary as an expense in determining the profits;[274] his salary *is* the profits. Thus, an award which covers the damages incurred by the copyright owner should not be extended beyond that point if the statutory recovery is not to be used as a penalty.

The threat of a 250 dollar minimum award is viewed as a significant weapon in preventing infringement, especially in the area of musical copyrights.[275] But its use is controversial; it is sometimes attacked as providing unfair bargaining power to licensors[276] and as exposing innocent infringers to the threat of a substantial number of claims.[277] At present, the 250 dollar figure is applicable to each distinct infringement and may be awarded any time either actual damages or profits are not determinable.

Most courts will award the statutory minimum even in the absence of any showing of injury to the proprietor or profits to the infringer,[278] although some courts have required some showing of actual injury as a prerequisite to statutory recovery.[279] As a general matter, there would seem to be strong reasons for requiring that a plaintiff show actual injury before the court may award statutory damages. The argument for such a rule can best be articulated in light of *Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc.*,[280] where the plaintiffs "professed their inability to prove sales lost due to the infringement, declining to offer 'evidence of supposition, opinions and all that business.' "[281] Although the *Woolworth* case[282] permits statutory recovery where either damages or the infringer's profits are unknown, it does not speak to the policies behind granting such award where there is no evidence at all of any injury. In addition, cases such as *Peter Pan* do not require recovery under the *Douglas* test of difficulty of proof;[283] the issue before the court is not the amount of injury but whether there was injury at all. In the absence of injury the grant of statutory recovery is at best a windfall for the proprietor, and while it would prevent unjust enrichment of the infringer in cases of innocent violation, this justification of recovery is weak indeed.[284] In *Sebring Pottery Co. v. Steubenville*

274. See note 205 *supra.*
275. R. BROWN, *supra* note 93, at 72.
276. *Id.* at 75.
277. *Id.*
278. *E.g.*, Russell & Stoll Co. v. Oceanic Elec. Supply Co., 80 F.2d 864 (2d Cir. 1936); Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924).
279. *E.g.*, Sebring Pottery Co. v. Steubenville Pottery Co., 9 F. Supp. 384, 387 (N.D. Ohio 1934).
280. 329 F.2d 194 (2d Cir. 1964).
281. *Id.* at 195.
282. 344 U.S. 228 (1952).
283. 294 U.S. at 209. See text accompanying note 274 *supra.*
284. See note 199 *supra.*

Pottery Co.,[285] the court in advancing a similar analysis said:

> In providing for recovery of a sum within the prescribed limits, in lieu of actual damages, Congress recognized the character of the actual damage done and [provided] that when actual damages are proven which cannot be measured in dollars and cents, then the court may, in the exercise of its sound discretion, award a sum within the maximum and minimum limits. That is, this law obviates the strict necessity of proving the exact amount of damage without negativing the necessity of proof of some real damage done.[286]

Requiring the plaintiff to show some harm would be consonant with traditional notions of our civil jurisprudence and it seems unwise to permit greater recovery solely because of the failure to carry a particular burden of proof.

While the statutory minimum is ordinarily awarded even in cases of innocent infringement,[287] the present Act does contain two specific clauses insulating certain innocent behavior. Sections 1(c)[288] and 101(b)[289] limit the liability of broadcasters to 100 dollars and movie makers to 5,000 dollars in cases where the infringer "shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen. . . ." These two exemptions from the rule of absolute liability[290] apply in narrow spheres, but their logic is not equally restricted. These provisions "represent a piecemeal attempt to limit the liability of [infringers] when they do not know or have reason to know they are infringing.

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285. 9 F. Supp. 384 (N.D. Ohio 1934).

286. *Id.* at 387.

287. *See* L.A. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100 (1919). Courts have occasionally lamented the necessity of awarding even the minimum recovery in cases of innocent infringement:

> Appellants' argument in support of their position respecting the amount of damages [*i.e.*, that the 250 dollar award was excessive under the circumstances] too has much appeal. But, unfortunately for them, there are too many judicial precedents which we can neither hurdle nor sidestep . . . .

Dreamland Ball Room v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929). In Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924), Judge Learned Hand was troubled by the unconscious plagiarism of composer Jerome Kern. Expressing his reluctance to award the statutory minimum in this case of innocent infringement, Hand stated:

> As for damages, it seems to me absurd to suggest that [the plaintiff] has suffered any injury . . . . The controversy is "a trivial pother" . . . scarcely more than irritation . . . .
>
> However, [the statutory damages provision] fixes a minimum of $250, which is absolute in all cases . . . . Therefore I must and do award that sum as damages.

Id. at 152.

288. 17 U.S.C. § 1(c) (1964).

289. *Id.* § 101(b).

290. See text accompanying notes 22-35 *supra.*

This can be the situation of many others dealing with copyrighted material."[291]

The proposed revision of the copyright law would make three changes in the statutory award provisions of the Code. First, it eliminates the various schedules of infringement awards for listed categories of protected works,[292] substituting instead a single minimum and maximum amount for each work infringed, 250 dollars and 10,000 dollars respectively.[293] This is not a fundamental alteration, since the schedules were not binding on courts in the past anyway.[294] It may have the advantage, however, of preventing the mechanical implementation of the statutory recovery measures which has sometimes marked their use.[295] Second, the revision clarifies the circumstances in which it is proper for the court to award statutory damages. Contrary to the present interpretation of the law,[296] statutory damages would be made available completely at the plaintiff's election.[297] Furthermore, there is no requirement that actual damages or the infringer's profits be unascertainable, nor any compulsion to award damages or profits if either of these is determined. Third, the revision incorporates a provision to adjust the statutory recovery depending on the innocence or willfulness of the infringer.[298]

III

PROGRESS AND PROSPECTS FOR INNOCENT INFRINGERS

Many of the rules governing liability for copyright infringement have developed under the pressure of a sense of justice rebelling at the harshness[299] of absolute liability imposed for innocent violations of a monopoly right. The provisions in the present law limiting the lia-

291. R. BROWN, *supra* note 93, at 81.

292. See note 254 *supra*.

293. S. 543, 91st Cong., 1st Sess. § 504(c)(1) (1969).

294. Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260, 265 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958).

295. *See, e.g.*, Turner & Dahnken v. Crowley, 252 F. 749 (9th Cir. 1918), where the district court's award of one dollar per copy for each of 7,000 copies of an infringing musical composition was reduced to 560 dollars by the court of appeals because "the duty of the court [is] to award damages as justified by the nature and circumstances of the case. . . ." *Id.* at 754. See also Schellberg v. Empringham, 36 F.2d 991 (S.D.N.Y. 1929).

296. Davilla v. Brunswick-Balke Collender Co., 94 F.2d 567, 568 (2d Cir. 1938), *cert. denied*, 304 U.S. 572 (1938).

297. S. 543, 91st Cong., 1st Sess. § 504(c)(1) (1969); see text accompanying notes 305-09 *infra*.

298. *Id.*

299. Barry v. Hughes, 103 F.2d 427 (2d Cir. 1939); *see* De Acosta v. Brown, 146 F.2d 408, 413 (2d Cir. 1944) (Hand, J., dissenting).

bility of innocent broadcasters[300] and movie makers[301] in certain circumstances only decrease the distorting effect of the strict liability doctrine in narrow spheres. Likewise, the exception for innocent infringement by persons misled by absence of a copyright notice,[302] while reflecting a broad need to exempt unintentional and unknowing conduct, only applies in a limited number of cases.[303]

It remains to be seen whether the revision bill will significantly lessen the inequities which up to now have caused the ad hoc manipulation of recovery rules to achieve a particular result in hard cases. A major factor will be the Code's treatment of innocence in the statutory damages section. Under the proposed revision, when the copyright owner sustains the burden of proving that the infringement was committed willfully, the court is authorized to increase the award to a maximum of 20,000 dollars if it deems that a just recovery.[304] If, on the other hand, "the infringer sustains the burden of proving, and the court finds, that he was not aware and had no reason to believe that his acts constituted an infringement,"[305] the court is given discretion to reduce the award of statutory damages to a minimum of 100 dollars.

The broad provision lowering minimum statutory damage awards to 100 dollars seems no less arbitrary than the general 250 dollar minimum figure. Neither is based on any claim that the figure represents an adequate approximation of the value of the harm done, or that it is a fair measure of what an infringer deserves, since the infringers subject to the minimum awards are by definition innocent. Moreover, the minimum figure does not, any more than would a higher amount, present a deterrence factor, since the persons subject to it neither know nor have any reason to know that they are infringing.[306] The committee report[307] indicates that the 100 dollar figure is a compromise between the positions of those who felt that no damages should be as-

300. 17 U.S.C. § 1(c) (1964).

301. *Id.* § 101(b).

302. *Id.* § 21.

303. The same interest is reflected in the rule of divestive publication; see text accompanying notes 126-33 *supra*. See also text accompanying note 134 *supra*.

304. S. 543, 91st Cong., 1st Sess. § 504(c)(2) (1969). The Judiciary Committee report indicates that, contrary to earlier revision proposals, the present bill allows a finding of willful infringement even where continued violation after actual notice cannot be shown. H.R. REP. No. 83, *supra* note 137, at 130.

305. S. 543, 91st Cong., 1st Sess. § 504(c)(2) (1969).

306. See text accompanying note 67 *supra*. The Register of Copyrights recommended that the revision bill provide that "if the defendant proves that he did not know and had no reason to suspect that he was infringing, the court may, in its discretion, withhold statutory damages or award less than $250." REGISTER'S REPORT, *supra* note 226, at 107.

307. H.R. REP. No. 83, at 130.

sessed against innocent infringers and those who wanted the 250 dollar minimum retained in all cases. The committee suggests that the 100 dollar minimum preserves the deterrent effect of the law "by establishing a realistic floor of liability . . . and it would not allow a defendant to escape simply because the plaintiff failed to disprove his claim of innocence."[308]

It is not clear, however, how the truly innocent infringer could possibly be deterred, or what considerations make the 100 dollar amount realistic in cases where the innocent infringement causes no damage at all. Further, the final argument of the committee amounts to saying that we should guarantee recovery to the plaintiff regardless of the innocence of the infringer, which is simply the statement of the conclusion and not a justification of the policy itself.[309]

The revision of the Code will make other procedural and substantive changes which in some respects reduce the dangers involved in holding innocent infringers strictly liable. Section 411 of the bill provides that no award of statutory damages or attorney's fees[310] shall be made for infringements of unpublished works occurring before registration. Previously the copyright owner was free to delay registering as long as he wished and still recover for infringement, despite the lack of constructive notice which registration provides.[311] While the new bill thus protects innocent infringers from statutory liability for infringement of unpublished and unregistered works, it does not provide this protection in cases involving published work, or in any suit where damages or profits are sought. Section 410 of the revision bill simply restates the rule of *Washingtonian Publishing Co. v. Pearson*[312] that a copyright owner may defer registration without losing protection, so long as he registers prior to instituting suit.[313] Thus, the concern evinced in section 411 over the fairness of making an innocent infringer liable for statutory damages where there is not even constructive notice is not extended to suits for damages and profits where the same degree of innocence or lack of notice may obtain.

The proposed Code's handling of the problem of innocent infringements which are caused by the absence of copyright notice[314] is an

308. *Id.*

309. See text accompanying notes 97-98 *supra.*

310. Both the present law and the pending revision authorize the court to allow recovery of costs and reasonable attorney's fees in its discretion. *Compare* 17 U.S.C. § 116 (1964) *with* S. 543, 91st Cong., 1st Sess., § 504 (1969).

311. Section 13 of the Act merely requires registration prior to filing suit. Washingtonian Publishing Co. v. Pearson, 306 U.S. 30 (1939).

312. 306 U.S. 30, 38 (1939).

313. *Id.* at 42.

314. *Cf.* text accompanying note 125 *supra.*

interesting step which may presage developments in other areas where copyrights are violated through actions wholly devoid of fault. Section 404(b) provides:

> Any person who innocently infringes a copyright, in reliance upon an *authorized* copy or phonorecord from which copyright notice has been omitted, incurs no liability for actual or statutory damages under [the recovery provisions of the Act] for any infringing acts committed before receiving actual notice that registration of the work has been made . . . if he proves that he was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin continuation of the infringing undertaking or may require, as a condition for permitting the infringer to continue his undertaking, that he pay the copyright owner *a reasonable license fee* in an amount and on terms fixed by the court.[315]

Several aspects of this section are significant. It is, of course, limited like its predecessor, section 21 of the Act, to authorized copies on which notice has accidentally been omitted; plagiarized copies with no notice do not fall within this provision, despite the obvious fact that to the innocent user and infringer the two look identical. The suggestion that authorized and unauthorized copies are distinguishable in that the copyright proprietor is more responsible for omissions on authorized copies—and hence that he should not be allowed to recover for infringements—is true in many cases but unpersuasive in the many instances of publication by a licensee where the dominion of the owner is highly attenuated. But even if one of the primary purposes of this section was to induce care in affixing the copyright notice,[316] the apparent implication of this section is that recovery from innocent violators—at least by a negligent plaintiff—is not justified. The committee report on the revision bill states:

> The general postulates underlying the provision are that a person acting in good faith and with no reason to think otherwise should ordinarily be able to assume that a work is in the public domain if there is no notice on an authorized copy or phonorecord and that, if he relies on this assumption, he should be shielded from unreasonable liability.[317]

Also of great importance is the language authorizing the setting of a reasonable license figure for the value of the copyrighted matter used. This provision makes it possible to avoid the forfeiture of the time and money which the innocent infringer has invested prior to dis-

315. S. 543, 91st Cong., 1st Sess. § 404(b) (1969) (emphasis added).
316. H.R. REP. No. 83 at 115.
317. *Id.*

covery of the infringement. Under this section he need not scrap the project, but may pay the reasonable value of the matter appropriated.[318] Prior to this time the reasonable value of copyrighted works has only rarely been considered, usually in cases where prior contracts or negotiations give an indication of what damage the proprietor has suffered.[319] This may be a step leading to increased use of the reasonable royalty standard of patent law,[320] which has until now been restricted to compulsory music licenses in copyright law.[321]

Taking a broader view, it is not altogether clear that the imposition of liability on innocent infringers in most cases where this now occurs is defensible. Since protection for the copyright monopoly should be no more extensive than necessary to serve the goals of the law,[322] these purposes must be considered in evaluating the innocent infringer problem.

If there is any deterrent impact to strict liability, it may well be seen in reduced production of creative works, due to the fear of unwittingly infringing a copyright. This result, of course, contravenes the basic purpose of copyright law: encouragement of creative production in order to improve society as a whole.[323] But even supposing that absolute liability does not deter production of creative works, it does not necessarily serve the other goals of liability as presently applied.

The goal of compensating the author for diminution of the value of his property is the only serious reason for refusal to fully exempt innocent infringers. Fear of unjust enrichment is not apposite and there is nothing unclean about the hands of these infringers;[324] they are not seeking to profit from their own wrongdoing. Similarly, deterrence of future infringement is probably not furthered by imposing liability on these infringers. The assertion that someone who has no reason to know that he is violating another's rights will be deterred from doing so by strict liability needs only to be fully formulated to be seen as a fallacy.

If, therefore, compensating the injured author is the only remaining goal served by the rule of strict liability, innocent infringers should be exempted in all cases where damages cannot be shown. There is no basis for a gratuitous minimum award if there has been no

318. *See* text accompanying notes 192-93 *supra.*

319. *See* Szekely v. Eagle Lion Films, Inc., 242 F.2d 266 (2d Cir. 1957).

320. See text accompanying notes 186-93 *supra.*

321. A blanket royalty has been set by Congress in this area and the courts do not vary it in individual cases, but considerations of fairness and reasonableness are applied to evaluations of this amount. *See* H.R. REP. No. 83, at 69-74.

322. See text accompanying notes 20-21 *supra.*

323. See text accompanying notes 9-16 *supra.*

324. See note 198 *supra.*

damage to compensate, and where the violation is truly innocent, the requirement that the plaintiff show that he is damaged is hardly an undue burden to impose.[325] This rule should also apply where the innocent infringer has made a profit which does not injure the proprietor of the copyright. Since there is no basis for a presumption that such profits automatically damage the copyright owner,[326] injunction against further infringement fully protects his interests without requiring forfeiture of the infringer's income sought in good faith.[327]

Where damages are shown, the problem boils down to its paradigm case: an owner of copyrighted property who is injured by—but not through the fault of—another party. Because of the special value society attaches to encouraging its authors,[328] the ordinary torts rule that negligence or intention must be shown should be subordinated to the overriding preference for compensating the injured author. This means that where actual damages are shown, innocence should not excuse an infringer from liability. Some radical reform bills proposed

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325. See text accompanying notes 80-81 *supra*; see especially note 269 *supra*. There appears to be no justification for a *presumption* of damage. The only convincingly articulated reason for imposing liability is that, between two innocent parties, the one who causes harm to the other should bear the loss. See text accompanying notes 99-101 *supra*. This reasoning sustains liability only where the harm is present; it does not militate for recovery where there are two innocent parties and one may *possibly* have harmed the other. In the latter sort of situation, Anglo-American jurisprudence places on the party alleging harm the burden of showing damage. It cannot be argued persuasively that this burden should be lightened or removed simply to protect authors. The purpose of the Copyright Act is to foster the production of all manner of creative works [see text accompanying notes 9 & 10 *supra*] and it is in furtherance of this goal to permit the production of many similar works. A presumption of harm in cases of innocent infringement directly contravenes this policy by discouraging creative production; it renders the creative enterprise significantly more risk-laden and, thus, would tend to reduce the amount of such production.

326. *See generally* Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc., 329 F.2d 194, 196 (2d Cir. 1964).

327. It is argued, moreover, that in revising the Code attention should be focused on enlarging the scope of an infringer's deductible costs to include his opportunity costs:

> Since it is reasonable to assume that an innocent secondary infringer would not have handled the infringing items had he known they were infringements, and that he would have obtained non-infringing items instead, there appears to be no valid objection to allowing him to deduct from the profits he made from the infringing items the profits he would likely have made had he not infringed. Moreover, since awards of profits as they are currently made may often serve to reward the copyright owner for the efficiency and good will of the infringer (the propriety of which is certainly questionable), adoption of the proposed analysis would ensure that the copyright owner only be awarded those profits to which he is equitably entitled. Since in the case of innocent secondary infringers such profits are likely to be negligible, it appears desirable that a revised act provide that no award of profits be made against such infringers.

Comment, *Joint and Several Liability for Copyright Infringement: A New Look at Section 101(b) of the Copyright Act*, 32 U. CHI. L. REV. 98, 122-23 (1964).

328. See text accompanying notes 8-15 *supra*.

in the early part of this century would have insulated the innocent infringer from all damages, holding him liable only for an injunction against future infringement.[329] These measures accurately identified the strict liability rule's unfairness and unnecessary harshness in most circumstances, a recognition which is reflected in the growing pattern of exemptions for innocence in the present law and the current revision proposals. The radical proposals of the past, however, would not have protected the author in the one situation where the goals of the Act demand it, where he actually suffers damages and the choice is between enforcing liability of an innocent infringer or letting the damage go uncompensated.

CONCLUSION

Copyright law has come a long way toward mitigating the severity of the doctrine of strict liability for infringement. In 1912 and 1952 the law was amended to limit the liability of innocent broadcasters[330] and movie makers[331] to certain specified amounts. Section 21 of the Act protects persons misled by the absence of a copyright notice who unintentionally infringe protected rights.[332] The proposed revision makes further advances.

The new bill would sweep away the previous statutory schedules of damages and replace them with a general statutory maximum and minimum which may be lowered to 100 dollars if innocence is shown. It denies recovery of statutory damages on unpublished works not registered until after the infringement.[333] Several specific problems in the recovery rules have also been handled by the proposed revision of the law. The fundamental confusion of the courts over the propriety of awarding the copyright owner both his damages and the infringer's profits is resolved,[334] as is the issue of when "in lieu" damages are available to a plaintiff.[335]

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329. *See* A. LATMAN & W. TAGER, *supra* note 26, at 149-52.

330. Act of July 17, 1952, ch. 287. 66 Stat. 752, codified at 17 U.S.C. § 1(c) (1964).

331. Act of Aug. 24, 1912, ch. 356, 37 Stat. 489, codified at 17 U.S.C. § 101 (b) (1964).

332. This provision reflects a policy of protecting innocence that dates back to the original copyright enactment, the Statute of Anne, 8 Anne, c. 19 (1710). Professor Kaplan notes:

> [To] prevent infringement through innocent mistake, it was provided that the forfeiture and penalty could not be exacted with respect to new books unless the title to the copy was entered, before publication, in the register book at the Hall of the Stationers' Company.

B. KAPLAN, *supra* note 2, at 7.

333. See text aecompanying note 311 *supra.*

334. See text accompanying notes 228-45 *supra.*

335. See text accompanying notes 295-96 *supra.*

On the other hand, there is no general policy yet taken by the legislature toward the punitive and protective uses made of such devices as deductions from profits for overhead or income tax expenses. Many similar practices exist in the application of the Code,[336] despite the non-penal nature of the civil recovery provisions on one side and the alleged absoluteness of the liability on the other. The absence of a legislative resolution of this sort of problem may lead to continued unfairness and distortion in the rules in order to achieve punitive or exculpatory results. The thorny problem of multiple infringements is not extensively dealt with in the proposed Code, despite the fact that this is not necessarily a problem which turns solely on the facts of individual cases,[337] and that it therefore is susceptible to legislative rule-making.

Over all, the proposed revision eliminates many of the greatest disparities in the practices of the various courts but leaves to them some of the more practical problems of award-computation. It moves the Code further toward the protection of innocent infringers but stops short of a thorough commitment to the proposition that an innocent infringer should be excused from liability in the absence of an overriding need to compensate an injured author.

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336. For example the imposition of joint and several liability on willful infringers while innocent infringers may only incur joint liability. See text accompanying note 175 *supra.*

337. See text accompanying notes 252-55 *supra.*